Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

JOHN UMANA,

Petitioner,

v.

SWIDLER & BERLIN, CHARTERED; STEVEN J. AGRESTA, EDWARD A. BERLIN, JOHN R. FERGUSON, JOHN S. HOFF, LESTER S. HYMAN, CARMEN D. LEGATO, BRUCE A. LEHMAN, LEONARD A. MILLER, KENNETH I. SCHANER, ROBERT S. TAYLOR, and ANDREW D. WEISSMAN,

Respondents.

On Petition for Writ of Certiorari to the District of Columbia Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

Mr. John Umana
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Petitioner, *Pro Se*

QUESTIONS PRESENTED FOR REVIEW

In this case, the D.C. Court of Appeals affirmed the decision of the D.C. Superior Court declining to vacate an arbitration award notwithstanding that trial judge Graae found in his June 16, 1995 Order denying Plaintiff's Rule 60(b)(2) and (3) motion, that the neutral arbitrator "violated AAA rules and his Oath as an arbitrator," in failing to make required disclosures. The neutral arbitrator concealed his relationship with defendant Ferguson, the Firm's party representative in the arbitration ordered by Judge Cushenberry. The questions presented are:

1. Whether Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968), is binding under Article III, Section 1 on the D.C. Court of Appeals, which declined to obey the Supreme Court ruling on their theory (745 A.2d at 341) that it "provides little guidance because of the inability of a majority of Justices to agree on anything but the result."

2. Whether the Swidler & Berlin arbitration must be vacated for evident partiality (or fraud or corruption or undue means) under the Uniform Arbitration Act (D.C. Code §§ 16-4311(a)(1) & (a) (2)) or under the Due Process Clause where the neutral arbitrator obtained his AAA appointment by swearing a false AAA Oath concealing his past attorney-client and other relationships and dealings with the defendant side, and where the trial judge found that the neutral arbitrator "violated AAA rules and his oath as an arbitrator."

3. Whether the lower courts erred in dismissing plaintiff's claims for failure to prosecute.

4. Whether it violates public policy to compel the arbitration of the claims in this action?

PARTIES TO THE PROCEEDING

The appellant in the proceedings in the D.C. Court of Appeals was John Umana. The Appellees were:
Swidler & Berlin, Chartered and its members Steven J. Agresta, Edward A. Berlin, John R. Ferguson, John S. Hoff, Lester S. Hyman, Carmen D. Legato, Bruce A. Lehman, Leonard A. Miller, Kenneth I. Schaner, Robert S. Taylor, and Andrew D. Weissman.

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CITATIONS OF OPINIONS BELOW

The February 17, 2000 opinion of the D.C. Court of Appeals (App. 1-23) affirming Judge Steffan W. Graae's June 16, 1995 Order (App. 24-28) denying Petitioner's 60(b)(2) and (3) motion for a new trial as to the arbitration award, is reported at 745 A.2d 334 (D.C. 2000). The Court of Appeals' February 13, 2001 order denying appellant's petition for rehearing *en banc*, is unreported. (App. 29) The December 29, 1995 decision of the Court of Appeals dismissing on grounds of lack of appellate jurisdiction in Plaintiff's prior appeal (no. 92-CV-1088), is reported at 669 A.2d 717 (D.C. 1995). The Court of Appeals ' July 18, 1996 order in that appeal, denying the petition of Swidler & Berlin ("Firm") for rehearing or rehearing *en banc*, is not reported. The May 4, 1990 Order of Judge Cushenberry (App 30), the May 15, 1991 arbitral award (App. 31-33), arbitrator Bernstein's dissent (App. 33-40), the July 22, 1991 amended arbitral award (App. 41-42), Judge Graae's June 15, 1992 order denying the motion to vacate the award and confirming the award (App. 43-46), the September 29, 1995 Order of Judge Winfield, denying defendant members' motion to dismiss for failure to prosecute (App. 47-48), and Judge Weisberg's April 21, 1997 order (App. 49-54), granting defendants' motion to dismiss for failure to prosecute and entering judgment, are not reported.

JURISDICTION

The order of the D.C. Court of Appeals affirming the Superior Court judgment was entered February 17, 2000, and the order denying appellant's petition for rehearing *en banc* was entered February 13, 2001. (App. 29) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause of the Fifth Amendment of the United States Constitution provides in relevant part: "No person shall ... be deprived of life, liberty or property, without due process of law ...." The Due Process Clause of the Fourteenth Amendment provides in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

D.C. Code §§ 16-4311(a)(1) & (a) (2) of the Uniform Arbitration Act provides: "Upon application of a party, the Court shall vacate an award where: (1) The award was procured by corruption, fraud or other undue means; [or] (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party."

STATEMENT OF THE CASE

"Our republican robe is soiled, and trailed in the dust. Let us repurify it. Let us turn and wash it white, in the spirit, if not the blood, of the Revolution." (Abraham Lincoln, Speech on the Kansas-Nebraska Act) Petitioner implores this High Court to protect the integrity and impartiality of court-ordered arbitrations conducted under the auspices of the American Arbitration Association, and to rein in those lower courts that have disobeyed this Court's ruling in *Commonwealth Coatings*. This is a case about bigotry. This is a case about a rigged arbitration where the neutral arbitrator swore a false Oath to obtain his appointment by the AAA. The arbitration conducted by the neutral arbitrator, after Judge Cushenberry in May 1990 ordered arbitration and

denied defendants' motion to dismiss the fraudulent misrepresentation claims (App. 30), was infected with the neutral arbitrator's swearing a false AAA Oath to obtain his appointment, corruption, bias and systemic conflict, including when the neutral arbitrator issued subpoenas to his own law firm as to matters in which he had a pecuniary interest. **Trial Judge Steffan W. Graae, on Petitioner's 60(b)(2) & (3) motion, presented with Ferguson's 1993 deposition in other litigation, found that the neutral arbitrator's failure to disclose that he knew defendant Ferguson (a defendant and the Firm's party representative in the arbitration) "violated AAA rules and his oath as an arbitrator."** (App. 25, n.2) The Court of Appeals "[saw] no reason to dispute" Judge Graae's finding. 745 A.2d at 340. Defendants (the Firm and its defendant members), over Plaintiff's opposition, had obtained an order to compel arbitration on May 4, 1990 from Judge Cushenberry (App. 30) under the arbitration clause (App. 57) in Plaintiff's September 10, 1984 members' employment contract with defendant law firm providing for arbitration "in accordance with the rules of the American Arbitration Association." The neutral arbitrator was nominated by defendant Firm. The neutral and the Firm's arbitrator ruled against Petitioner (May 16, 1991, amended July 22, 1991 (App. 31-33; 41-42)) on all claims, holding that Plaintiff had been an associate and not a member of the firm, and also awarded the Firm its $51,213.67 arbitration counterclaim for fees claimed to be owing by a client which the Firm had never billed, later setting off against the counterclaim award (App. 41-42) the amount of interest on Petitioner's contributions to the members' "Profit Sharing Plan."

Judge Graae confirmed the arbitration award on June 15, 1992 and denied Petitioner's *pro se* motion to vacate (App. 43-46). In December 1992, the AAA sued Petitioner (CA-

16615-92) for additional fees claimed by arbitrator Pitofsky, and Petitioner, now represented by the late Robert W. Steele, Esq. and Cheryl Browning, Esq., took discovery, leading the Superior Court (Judge Evelyn E. Crawford Queen) on August 26, 1993 to deny AAA's motion for summary judgment; AAA then withdrew its action. Based on the new evidence discovered in Mr. Steele's deposition of Ferguson in the AAA suit, Judge Steffan W. Graae in the instant case found in his June 16, 1995 order (App. 24-28) denying plaintiff's (per Robert W. Steele, Esq.) SCR-Civ. 60(b)(2) and (3) motion, that the neutral arbitrator's failure to disclose that he knew defendant Ferguson *"violated AAA rules and his oath as an arbitrator."* (App. 25, n.2) Judge Graae also found: *"There is no doubt that it would have been far better if [the neutral arbitrator] had made the required disclosure of his prior contacts with Mr. Ferguson. Indeed, much of this post-arbitration litigation probably could have been averted had he done so."* (App. 27) (italics added.) Notwithstanding these findings, Judge Graae denied the 60(b) motion, and denied any discovery against defendants. Judge Graae did permit the Ferguson deposition to be included in the record (App. 28). (Mr. Pitofsky also subpoenaed in the AAA suit pleaded judicial immunity via Arnold & Porter's motion to quash, which Judge Queen granted on August 26, 1993.) Judge Graae declined to permit the mandatory evidentiary hearing[1] on the motion to vacate the arbitration, and denied plaintiff any deposition or other discovery from defendants. Respondent Ferguson, a key defendant and a witness in the Swidler & Berlin arbitration, was also the Firm's party representative during the February 21-23, 1991 arbitration hearing, seated at counsel table next to Jamie Gorelick, defendants' counsel. The late Mr. Steele's deposition of

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1 Sanko S.S. Co., Ltd. v. Cook Industries, Inc., 495 F.2d 1260, 1263-64 (2d Cir. 1973).

Ferguson revealed that the "neutral arbitrator" and Ferguson had a previous attorney-client relationship and other loyalty relationships, facts unknown to petitioner and concealed from Petitioner in the neutral arbitrator's sworn AAA Oath.

On the 1995 finding of Judge Graae, reversal of the arbitral award is *mandatory* under the Supreme Court holding in Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968), a case relied on by Petitioner in the trial court and in his two appeals to the court of appeals. The requirement of impartiality of arbitral adjudication in *Commonwealth Coatings* is "a constitutional principle" (395 U.S. at 148) grounded on the Due Process Clause. The Uniform Arbitration Act[2] provides: "Upon application of a party, the Court **shall vacate** an award where: (1) The award was procured by corruption, fraud or other undue means; (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party." D.C. Code §§ 16-4311(a)(1) & (a) (2). (Emphasis added.) Under any one of these statutory standards and under the Due Process Clause, the Swidler & Berlin arbitration must be vacated. The Supreme Court holding in Commonwealth Coatings mandates vacation of the arbitration, and is binding on the D.C. Court of Appeals though the court of appeals declined to obey this Court's ruling vacating that award for failure of the arbitrator to make disclosures. The D.C. Court of Appeals ruling in this case, 745 A.2d 334, is directly contrary to Commonwealth Coatings grounded on Due Process, and

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2 The D.C. Arbitration Act, D.C. Code §§ 16-4301 to 16-4319 (1981), the Uniform Arbitration Act adopted in some 34 states and the District of Columbia, "shall be construed as to effectuate its general purpose of making uniform the law of the District of Columbia and those states which enact it." D.C. Code § 16-4319; Thompson v. Lee, 589 A.2d 406, 410-11 n.5 (D.C. 1991).

other decisions of this Court. It strays far from the limits on the court of appeal's authority, is erroneous as a matter of law, and impairs and deprives Petitioner of his constitutional and civil rights to equal rights under the law. District politics must be permitted to hold no sway in this case. The Court of Appeals disobeyed this Court's decision in Commonwealth Coatings, choosing instead to rely on the dismissive opinion of Circuit Judge Posner in Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673 (7th Cir. 1983), that *Commonwealth Coatings* "provides little guidance because of the inability of a majority of justices to agree on anything but the result ...." 745 A.2d at 341, citing *Merit Ins.*, 714 F.2d at 681. In truth, this Court provided its guidance in the form of its ruling. Ever since Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60 (1803), the Supreme Court has remained the ultimate expositor of the constitutional text, and its ruling must be heeded by the local D.C. courts. As this Court there held,

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court. ...The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

1 Cranch at 163. This is so regardless of a plaintiff's ethnic or religious background. "[A] law repugnant to the constitution is void; and ... courts, as well as other departments, are bound by that instrument." 1 Cranch at 179. The principle that we are a government of laws originated in the English

common law, and Blackstone described it as "a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded." 3 W. Blackstone, Commentaries 23 (1783). See Ashby v. White, 1 Salk. 19, 21, 87 Eng.Rep. 808, 816 (Q.B. 1702).

Petitioner respectfully urges this High Court in the interest of our American Democracy, to preserve the integrity and impartiality of court-ordered arbitrations as the *Commonwealth Coatings* Court sought to do, to resolve a fundamental conflict among the circuits and state courts as to the application of *Commonwealth Coatings* ruling as a binding decision of the Supreme Court, and to rein in the lower courts that declined to obey (or purport to "distinguish" away) the *Commonwealth Coatings* ruling. See, e.g., Merit Ins. Co. v. Leatherby Ins. Co., supra; Beck Suppliers, Inc. v. Dean Witter Reynolds, Inc., 558 N.E.2d 1187 (Ohio 1988); Dowd v. First Omaha Securities Corp., 495 N.W.2d 36, 42 (Neb. 1993)("the U.S. Courts of Appeal have not adopted the so-called *Commonwealth Corp.* 'appearance of bias' test"); Banwait v. Hernandez, 205 Cal.App.3d 823, 252 Cal.Rptr. 647 (1989); DeBaker v. Shah, 533 N.W.2d 464 (Wis. 1995); Drinane v. State Farm Mut. Auto. Ins. Co., 584 N.E.2d 410, 413 (Ill. App. 1991) ("Because of the tension between the plurality and concurring opinion of *Commonwealth Coatings*, we agree with those courts which have tended to view the opinion as limited in its application."); Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753 (11th Cir. 1993). Andros Compania Maritima S.A. v. Marc Rich & Co., 579 F.2d 691, 699 (2d Cir. 1978)("The diverse views expressed in these opinions pose difficulties in applying the teachings of *Commonwealth Coatings*."). See also Al-Harbi v. Citibank, N.A., 85 F.3d 680 (D.C. Cir. 1996) (arbitrator claimed he did not know that his former law firm had represented a party);

Transit Casualty Co. v. Trewick Reinsurance Co., 659 F. Supp. 1346 (S.D.N.Y. 1987), aff'd, 841 F.2d 1117 (2d Cir. 1988) (arbitrator did not know that company in which he held stock had an interest in a party); Apperson v. Fleet Carrier Corp., 879 F.2d 1344 (6th Cir. 1989); Sanford Home for Adults v. Local No. 6, IFHP, 665 F. Supp. 312 (S.D.N.Y. 1987); Sofia Shipping Co. v. Amaco Transport Co., 628 F. Supp. 116 (S.D.N.Y. 1986); Pompano-Windy City Partners v. Bear Stearns & Co., 794 F. Supp. 1265 (S.D.N.Y. 1992); Hamson v. Pan Pacific Trading Corp., 943 P.2d 322 (Wash. Ct. App. 1997). Compare Parks v. Sombke, 732 A.2d 907 (Md. App. 1999)(vacating arbitration where arbitrator failed to disclose his law firm's attorney-client relationship); Middlesex Mutual Ins. Co. v. Levine, 675 F.2d 1197 (11th Cir. 1982)("a reasonable appearance of bias" warrants vacating on grounds of evident partiality). This state of disarray in the lower courts as to the meaning of an impartial arbitration and Due Process of law should be addressed again by this High Court.

If arbitrations are to be accorded respect by the Bar and the American public and the international community of nations, and if the policies favoring arbitrations are to be fostered by the courts, then rigged arbitrations where the court has compelled arbitration and where the trial court has found that the neutral has sworn a false oath, must be vacated. Swearing false oaths, fraud, corruption, and bigotry have no place in the court system of our Democracy. They are a disgrace to the American way of justice, to our Founding Fathers, and a sin before our Creator who endowed this Nation with gifts beyond those of any other. All the Justices in their separate Opinions in *Commonwealth Coatings* upheld the disclosure obligations of the arbitrator to safeguard impartiality of the process. The arbitration in this case must be vacated under either Justice Black's plurality opinion or the

concurring opinion of Justices White and Marshall (or even under the dissenting opinion of Mr. Justice Abe Fortas). The neutral swore a false Oath, and had a pecuniary interest in the subject of his two subpoenas to his own law firm. He was a biased and conflicted arbitrator, who disobeyed Judge Cushenberry's Order compelling arbitration of claims even against his old crony, Ferguson, and the other defendant members. His subpoenas to his own law firm placed him in an irreconcilable conflict of interest. He refused to compel the Firm to produce documents or answer discovery, while at the same time granting the Firm compulsory process against Petitioner. The neutral arbitrator permitted defendants' counsel at the arbitral hearing to cross-examine plaintiff about clients that did or did not follow him from the neutral arbitrator's law firm. See Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986)(Due Process Clause requires vacation where judge has an interest in the outcome).

On Petitioner's first appeal, 669 A.2d 717 (D.C. 1995), the D.C. Court of Appeals (92-CV-1088) declined to take appellate jurisdiction where Petitioner's claims against the individual defendant members had not, at that time, been adjudicated by the trial court, and it dismissed solely for lack of jurisdiction, not deciding in that appeal whether Petitioner's claims were arbitrable.[3] In that appeal, Swidler urged the

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3 In the first appeal, Petitioner argued *inter alia* that the arbitration clause in the members' employment contract did not cover the specific disputes in question, Amer. Fed. of Gov't Employees, Local 3721 v. District of Columbia, 563 A.2d 361 (D.C. 1989), and further that public policy prohibited arbitration of matters of ethics. See Wieder v. Skola, 609 N.E.2d 105 (1992)(responsibility for maintaining standards of ethics lies "exclusively" with the courts). See Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 36 (1987), citing W.R. Grace & Co. v. Local Union No. 759, 461 U.S. 757, 764 (1983). See also Prof. Administrators v. Kopper-Glo Fuel, Inc., 819

Court of Appeals to exercise jurisdiction and decide that appeal against Petitioner on an appeal record without the Ferguson deposition. On July 18, 1996, the *en banc* Court of Appeals, including Judge Steadman, in appeal No. 92-CV-1088 denied Swidler & Berlin's petition for rehearing or rehearing *en banc*, declining jurisdiction.

The AAA's Arbitrator's Oath required the neutral arbitrator to "disclose any past or present relationship with the parties or their counsel, direct or indirect, whether financial, professional, social or other kind. If any relationships arise during the course of the arbitration, they must also be disclosed." Yet, the neutral made partial, selective disclosures that he knew both arbitration counsel and was aware that Petitioner had been at his law firm without working with him on any projects -- and yet remained completely mum as to his old friend Ferguson with whom he had a loyalty relationship and a past attorney-client relationship when the two men worked at the FTC and Ferguson won the octane case for him (facts unknown to Plaintiff). In fact, Ferguson's 1993 deposition (after Judge Graae confirmed the arbitral award on June 15, 1992 (App. 43-46)) proved that Ferguson had an undisclosed relationship with the neutral arbitrator dating back to the early 1970's when both men worked together as high officials of a small elite group of political appointee staff who ran the Federal Trade Commission under President Richard M. Nixon. The neutral arbitrator was at that time Director of the Bureau of Consumer Protection and Ferguson was Assistant Director of the Bureau of Competition., and later became Assistant General Counsel for the FTC while Mr. Pitofsky

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F.2d 639, 643 (6th Cir. 1987)(refusing to confirm arbitral award that violated federal labor policy). The Court of Appeals did not rule that the claims were arbitrable until its February 17, 2000 Opinion, eight years after this issue was appealed .

remained Bureau Chief. The two men worked together at the FTC on advertising and developing FTC policy, on the FTC Task Force on Industry Self-Regulation, chaired by Mr. Ferguson, and in FTC-related litigation. Most significantly, these two men were in an attorney client relation when Ferguson spearheaded the FTC's litigation defense of the "octane rating" rule promulgated by Mr. Pitofsky at the FTC. Mr. Ferguson prided himself on his successful legal defense of the Pitofsky octane rating rule. **As Ferguson testified: "[W]e essentially took this project out of the appellate section and put it in my section, and we won, just to put the cap on it." (Ferguson Dep., 66) The octane brief "was regarded as a real challenge and a matter of considerable importance and I was certainly pleased to have the opportunity." Id., 68. "There is no doubt" that it was a "very important matter."** Id. As Ferguson's deposition showed, the neutral arbitrator was later to show his gratitude and continuing loyalty to his former counselor, first, when Ferguson left the FTC for private practice and was confronted with an ethical disqualification motion in subsequent FTC litigation, and, second, in the Swidler & Berlin arbitration. The neutral arbitrator himself recognized that Ferguson's retaliation was an issue in the arbitration. When Ferguson left the Commission for private practice, the two men continued their relationship, and Ferguson's (then) law firm regularly invited the neutral arbitrator to its annual spring dinner. In 1980, when Ferguson appeared before FTC Commissioner Pitofsky in the Brunswick litigation, Mr. Pitofsky's panel absolved Ferguson and his law firm from conflict-of-interest charges presented by disqualification motion. According to the deposition, the allegation was that his firm had violated the Disciplinary Rules after Ferguson allegedly procured the Brunswick respondent as a client by

hiring the FTC's lead trial counsel in the Brunswick docket from the FTC. The FTC panel on which Mr. Pitofsky sat and authored opinions, absolved Mr. Ferguson and his (then) firm and denied disqualification, but warned against such conduct in the future. The neutral disclosed nothing of this past in his sworn AAA Oath. And even when Ferguson was sworn as a witness before him in the arbitration, the neutral and his former counselor remained mum about their longstanding relationships.

In addition, during the course of the arbitration, the neutral arbitrator subpoenaed his own law firm twice on the application of defendant Swidler & Berlin, making the neutral arbitrator's own law firm, a material witness in the case and creating an irreconcilable conflict for the neutral arbitrator. The neutral's law firm complied with the subpoena even before the neutral issued it and even before notice to the Petitioner. Further, the neutral arbitrator denied Petitioner compulsory production of documents from Swidler & Berlin, while issuing subpoenas to his own law firm, underscoring his bias and partiality. Notwithstanding Judge Cushenberry's 1990 Order (App. 30) granting defendants' joint motion to compel arbitration of all claims in the Complaint (and denying defendants' motion to dismiss the fraud count), the neutral arbitrator declined to adjudicate any claims against his former counselor Ferguson or the other defendant members of Swidler & Berlin, choosing instead to disobey the Judge Cushenberry's Order.

In addition to all of this, the neutral arbitrator had a financial interest in the subject matter of the clients of his own law firm and legal "business" that did or that did not follow Petitioner, a theme of Swidler's cross-examination of appellant before the neutral arbitrator and of the subpoenas the neutral issued to his firm. Cellular Radio Corp. v. OKI

America, Inc., 664 A.2d 357, 360-61 & n.5 (D.C. 1995), citing Celtech, Inc. v. Broumand, 584 A.2d 1257, 1259 (D.C. 1991). See also Carl v. Children's Hospital, 702 A.2d 159 (D.C. 1997) (rehearing en banc reversing the lower court's dismissal of retaliatory discharge complaint). Not only did the defendants and the neutral arbitrator rig the arbitration, but defendants' counsel's cross-examination of Petitioner as to the neutral's law firm's business was calculated to bias the neutral arbitrator. (In fact, at all times, Petitioner acted respectfully and ethically in departing from his former firm in 1984 to join the Firm, and a Swiss bank elected to follow Plaintiff to his new firm, where at Swidler & Berlin, with the able assistance of Tom Lemberg, he overturned a decision for them at the CFTC. The Swiss legal business was a matter in which the neutral had a pecuniary interest at his law firm.)

On May 16, 1991, the neutral (together with the Firm's party arbitrator, James Robertson) ruled that Petitioner had not been a member but rather an associate of Swidler & Berlin (App. 31-33), and then ruled that Petitioner must pay $51,213.67 for fees Swidler claimed were owed by a client (for Petitioner's own time), never billed to that client. Arbitrator Bernstein (selected by Covington & Burling) dissented sharply based on the record facts. (App. 33-40) After the award, Petitioner's counsel requested a ruling on plaintiff's rights in the Swidler & Berlin members' pension plan in which Petitioner as a member had made contributions. On July 22, 1991, the neutral arbitrator amended his award (App. 41-42), pointedly this time on the letterhead of his law firm, again ruling that Petitioner was merely an associate, and denying him all rights in the member's pension plan to which he had contributed. Instead, the neutral arbitrator simply deducted the interest on Petitioner's plan contributions from the counterclaim he had already awarded to the Firm. In so ruling, the neutral arbitrator, as part of his fraudulent and

corrupt scheme to aid Ferguson and the Firm and to punish Petitioner for leaving his firm with a Swiss bank client, disregarded the entire documentary record in the case, including Petitioner's repeated Continuing Bank Guarantees of millions of dollars of the Firm's debt to the banks and the firm promissory note Petitioner was required to sign as a member owner holding stock in the Firm. The Firm still has not released Petitioner from the Guarantees they had him sign. The neutral arbitrator, after issuing his award, allowed these Continuing Guarantees in the record after Petitioner obtained them from the bank, as the Firm did not produce them and the neutral would not compel their production.

As arbitrator Jules Bernstein stated in his dissenting opinion (App. 33-40) the record at the arbitration showed that the Petitioner was an equity member of the Firm who had paid capital into the firm, received stock and signed the firm's bank note. Although required to give back his stock in connection with his being forced out, defendants left Petitioner liable on the bank note and the continuing bank guarantees of millions of dollars of Swidler's bank debt.

A. Facts Adduced at Arbitration Hearing

Petitioner joined Swidler & Berlin (the "Firm") in 1984. In 1985, Petitioner became a stockholder, member and director of Swidler & Berlin and, like the other members, the Firm issued him one share of stock in the firm representing his ownership and voting rights therein, and he paid in capital to the Firm. The Firm's Articles of Incorporation and Bylaws of Swidler provide for one class of stock and one class of member. During 1985, Petitioner made capital contributions as a member of the Firm, and he was promoted as an equity member from 3.00 points to 3.25 points on the Firm's compensation system. In that same year, Petitioner executed

a Continuing Guarantee in favor of D.C. National Bank/Sovran Bank, binding him as guarantor on the firm's bank debt. In January 1986, the firm obtained Petitioner's personal financial statement as one of its members for submission to D.C. National Bank/Sovran Bank to secure its line of credit, and represented that Petitioner was a member of the Firm. On August 15, 1986, only a few months before he was excluded, Petitioner, like the other members, executed a second Continuing Guarantee in favor of Sovran Bank. Under the Continuing Guarantee, Petitioner remained a guarantor and surety of all of the Firm's bank debt, past, present or future, on obligations exceeding $2,000,000, from which he still has not been discharged. Also on August 15, 1986, Petitioner signed the firm's secured 5-year note in favor of Sovran, personally, in the face amount of $257,280.88. Petitioner voted for the admission of at least three other equity members of the firm, and on all other matters that came before the membership. (The firm, a professional corporation, was also referred to as a partnership by its members, who also referred to themselves as partners.) The firm listed Petitioner as a member in Martindale Hubble, and so stated in documents to the banks and courts.

At the year-end Swidler members' meeting on October 29, 1986, defendants asked founding partner Joe Swidler to leave (in connection with a matter ostensibly pertaining to him) and subsequently asking Petitioner to leave the members' meeting. Behind his back, they then purported to remove Petitioner from membership and then to pretend that he never was one. No vote of the members was taken to remove Petitioner from the firm, although the firm's Bylaws require a two-thirds vote to remove a member. Apart from Petitioner, another member, Forrest Hainline, also so testified at the arbitral hearing conducted by the neutral arbitrator. As Petitioner later learned from managing member Schaner and

Hainline who debriefed him, at the October 29 year-end members' meeting, Petitioner's partnership points were reduced from 3.25 to 3.0 points, and thereafter Petitioner was told by the Firm (on October 30, 1986 through Ken Schaner and Forrest Hainline) that "the partnership, the firm" had decided to make him a "non-equity" and "non-tenured member." Even the managing member's secretary, Sandy Joy, testified at the arbitration hearing that Mr. Schaner did not previously refer to Petitioner as a "non-tenured" partner, a position defendants later assumed after the October 29 members' meeting. After Petitioner's October 30, 1986 meeting with Ken Schaner and Forrest Hainline, Petitioner met separately with Forrest Hainline (whom Schaner had selected as the Firm's representative to talk with Petitioner), who advised plaintiff "not to rock the boat" and "to continue to do a good job in [the Chicago class action]" and Hainline would do what he could to help Petitioner. Petitioner continued diligently to litigate his cases and the class action in the Northern District of Illinois for which he had obtained class certification as a securities fraud and RICO case.

Defendant Schaner claimed in his self-serving October 30, 1986 memo "that non-tenured Members should not have paid capital (John [Umana] was the only one to have paid and he has been given a refund ....") In a clumsy effort to justify their ruse, on October 31, 1986, two days after the October 29th year-end members' meeting, the defendants amended the firm's Bylaws purporting to create a new class of inferior members who would not receive stock and would not make a capital contribution, and *they purported retroactively to place Petitioner in that new class*. On November 25, 1986, Petitioner returned his stock certificate to defendant Schaner with Petitioner's note that stated "I'm returning this pursuant to Ken Schaner's instructions to me." Petitioner returned his stock in reliance on the false representation of the managing

member on October 30, 1986 that "the partnership, the firm" had decided to make him a non-equity member, that is, by a proper two-thirds vote, as the Bylaws required. Defendants did not dispute that Petitioner did not learn that no vote was taken until after he had left the Firm in June 1989 (after concluding the Chicago class action), as Forrest Hainline had told him and testified, and they offered no contrary evidence. Even after ousting Petitioner, the Firm did not show the decency of removing him as a surety and guarantor to the Banks or to remove him from the promissory note maturing in June 1991, and they failed even to advise him of his status as a continuing obligor with the Bank, which he later discovered from the Firm's bank. Now 10 years after the arbitration, they still have not. The Firm's counsel, after the arbitration was completed, acknowledged the continuing nature of the Guarantees Swidler had Petitioner sign and that these Guarantees were in effect "when this case was before the arbitrators."

The Chicago class action brought no revenues to the firm until Petitioner obtained a $10,520,000 judgment against a large Chicago law firm, and approximately $2,000,000 fee award to his firm in March 1989, as he was being forced out of the firm. Yet, even after the defendants purported to exclude Petitioner, the Firm's final class action fee petition to the U.S District Court for the Northern District of Illinois in 1988, on the $10.52 million judgment in the class action, billed Petitioner's hours at members' rates and extolled Petitioner's credentials and experience. Petitioner earned a $500,000 fees to the Firm in other of his cases in the Eastern District of Virginia and in D.C. Superior Court -- of which defendants gave Petitioner nothing. Petitioner left the Firm in June 1989, nearly three years after defendants' wrongful exclusion, after successfully carrying out his responsibilities as class counsel to the investors in the securities class action.

B. The 1993 Ferguson Deposition in the AAA Suit Concerning the Defendant's Undisclosed Relationships with the Neutral Arbitrator, Presented in Petitioner's 60(b) Motion

The neutral arbitrator disclosed in his November 1, 1990 AAA Oath that he had known counsel for the parties, Ms. Gorelick and Mr. Stein, "socially and professionally for some time"; that "among other connections," he was a member of the D.C. Board of Governors of the Bar at a time when Mr. Stein was its President and at a time when Ms. Gorelick was a member of that Board; that "John Umana was at Arnold & Porter during the period 1977 to 1984 and I was Counsel to the firm during part of that time, but I don't believe we worked on any projects together." Yet, Pitofsky remained mum in his Affidavit about any relationship with Ferguson, the Firm's party representative during the arbitration, or even the fact that he knew Ferguson since 1970. The following facts are contained in the AAA deposition of defendant John R. Ferguson conducted by the late Robert W. Steele, Esquire on July 21 and August 11, 1993 in the AAA lawsuit for additional fees for the neutral arbitrator: Defendant Ferguson and Robert Pitofsky have been on a first-name basis since 1970, when Mr. Pitofsky was Director of the Bureau of Consumer Protection and John Ferguson was Assistant Director of the Bureau of Competition and later Assistant General Counsel for the Federal Trade Commission ("FTC"). (Ferguson Dep. 14, 26-27, 31-33.) The two men worked closely together in connection with the preparation of the FTC's legal defense, and briefing in support of, the "octane rating" rule which Pitofsky originated and the FTC Bureau of Consumer Protection he then headed. (Ferguson Dep. 58-68, 144.) This was one of the most important matters to the Federal Trade Commission. (Id. at 68.) The two men were in

an attorney-client relationship when Pitofsky headed the FTC Bureau of Consumer Protection, Ferguson was the FTC Assistant General Counsel, and Ferguson successfully defended Pitofsky's "octane ratings" rule, and met and worked with Pitofsky in the process. John R. Ferguson was Pitofsky's attorney in Pitofsky's capacity as a Bureau Chief. (Id., at 58-68, 144.) Pitofsky and Ferguson normally attended weekly Commission meetings at the same time during the period, 1970 through 1972. (Id. at 26-42.) When Mr. Pitofsky and Mr. Ferguson would see each other, Mr. Ferguson would say, "Hello, Bob" to Mr. Pitofsky. (Id. at 31-32.) Pitofsky and Ferguson were part of the same "team." (Ferguson Dep. 121-22.) Ferguson referred to non-FTC people as "outsiders." (Ferguson Dep. 76.) Ferguson acknowledged that he may have written as many as twenty-five (25) memoranda to Mr. Pitofsky when they worked together, and believes that it would be fewer than 50. (Ferguson Dep. 135.) The two men wrote and copied memoranda to each other, and Pitofsky wrote memoranda to the FTC Commissioners passing along and adopting Ferguson's work product and recommendations. (exhibits 2, 3 and 4 to Ferguson Dep.) Pitofsky and Ferguson were also both active in the FTC's cases on advertising and in developing Commission policy on the subject of "Kid-Vid" (advertising programs addressed to children). (Ferguson Dep. 109-10, 115-16.) Both Pitofsky and Ferguson were involved in the FTC Task Force on Industry Self-Regulation, conceived, originated and chaired by Ferguson. The Task Force included members from Mr. Pitofsky's bureau. (Ferguson Dep. 124-25, 128; and exhibit 3 thereto.) Ferguson sent the task force report to Mr. Pitofsky. (Id., ex. 3, page 2.) After Ferguson left the FTC for private practice (1972), his law firm regularly invited Mr. Pitofsky to its annual spring dinner. (Ferguson Dep. 84-88, "I am sure that [Mr. Pitofsky] would have been on an invitation list.") During 1978-81, Pitofsky was an FTC commissioner (exhibit

7 to Ferguson Dep.) during the period when Ferguson tried cases before the FTC. Pitofsky sat as a judge in the highly litigated Brunswick case in which Ferguson became lead counsel for a large Japanese corporation named as respondent in that case. See In re Brunswick Corp., 95 F.T.C. 324 (2/22/80) (attached as exhibits 6 and 13 [FTC slip opinion] to Ferguson Dep.). Commissioner Pitofsky authored the key substantive opinions in that case based on briefs submitted by Ferguson. (See in re Brunswick, 96 F.T.C. 151 (8/14/80); Ferguson Dep., exhibit 8 thereto.) In the Brunswick case, Commissioner Pitofsky sat as commissioner adjudicating Brunswick's motion to disqualify Mr. Ferguson and his law firm on ethical grounds. (Ferguson Dep., exhibits 10, 13 thereto.) Brunswick's motion charged that Ferguson's firm had violated ethical prohibitions under Disciplinary Rule 9-101(B), ABA Opinion 342, and the Commission's Rules of Practice. (Ferguson Dep., exhibit 15, pages 6-9.) Ferguson testified before Commissioner Pitofsky by submitting two affidavits (Ferguson Dep., exhibit 11 at pages 2029L, 2029M, 2056B) to the FTC Commissioners. Relying on Ferguson's testimony, Pitofsky rejected the ethical charges against Ferguson's firm and exonerated his former counselor. (In re Brunswick Corp., 95 F.T.C. 324 (2/22/80); exhibit 13, Ferguson Dep.)

Presented with the new evidence contained in the Ferguson deposition with Petitioner's 60(b) motion, Judge Graae found that the neutral arbitrator's failure to disclose that he knew Ferguson "violated AAA rules and his oath as an arbitrator." (App. 25, n.2)

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Opinion Below Repudiating Commonwealth Coatings Conflicts with This Court's Decisions and the Court of Appeals' Prior Decisions

If the Petitioner has a right to an impartial arbitral adjudication and that right has been violated, do the laws of his country afford him a remedy? The Supreme Court has answered, "yes," but the court of appeals has answered, "no." Under any one of the standards under D.C. Code §§ 16-4311(a)(1)("corruption, fraud or other undue means") and (a)(2)("evident partiality"), or under the Due Process Clause, the judgment of the Superior Court affirming the arbitration must be reversed. In Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968), six Justices overturned an arbitral award where the arbitrator's relationship with one of the parties was not disclosed by the arbitrator or by the other party until after the arbitral award was made, even while the Justices found no actual bias in that case. The Supreme Court held that an arbitrator is required to "disclose to the parties any dealings that might create an impression of possible bias." 393 U.S. at 149. Mr. Justice Black, writing for a plurality of four Justices, also imposed the requirements applicable to Article III judges on arbitrators. Mr. Justice White wrote a concurring opinion joined by Mr. Justice Marshall which expressly joined the opinion of the Court: *"While I am glad to join my Brother Black's opinion in this case, I desire to make these additional remarks."* 393 U.S. at 150 (italics added). Justice White declined only to decide that arbitrators are to be held to the same standards of judicial decorum as Article III judges (393 U.S. at 150) -- *an issue not pertinent to the case at bar.* (The D.C. Court of Appeals stated incorrectly that "Umana also argues that Pitofsky should be held to a more stringent standard

applicable to judges," 745 A.2d at 339, n. 6, contrary to the record.) Justices White and Marshall endorsed the *Commonwealth Coatings* plurality opinion that an arbitrator must make extensive disclosure before the arbitration and voted to vacate the arbitration. Arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial. 393 U.S. at 150. Justice White stated that arbitrators must err on the side of disclosure so that courts may identify those undisclosed relationships which are too insubstantial to warrant vacating an award. 393 U.S. at 152. Thus, in condemning the arbitrator's nondisclosure that they voted to vacate, the six majority Justices in *Commonwealth Coatings* held that arbitrators must "avoid even the appearance of bias," id. at 150, and must "disclose to the parties any dealings that might create an impression of possible bias," id. at 149. Congress intended "to provide not merely for any arbitration but for an impartial one." Id., 147. Their holding requires vacation of the Swidler & Berlin arbitration.

Mr. Justice Abe Fortas with Justices Harlan and Stewart, concluded in his dissent:

> "I agree that failure of an arbitrator to volunteer information about business dealings with one party will, prima facie, support a claim of partiality or bias. But where there is no suggestion that the nondisclosure was calculated, and where the complaining party disclaims any imputation of partiality, bias, or misconduct, the presumption clearly is overcome." 393 U.S. at 153.

Even on the standard advocated by Justice Fortas, the Swidler & Berlin arbitration must be vacated. None of the

Opinions in *Commonwealth Coatings* lends support to the "outright chicanery" (393 U.S. at 150) presented on this record. See also United Paperworkers International Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 38 (1987)("Of course, decisions procured by the parties through fraud or through the arbitrator's dishonesty need not be enforced.")

Petitioner respectfully urges this High Court in the national interest of safeguarding impartial arbitral adjudications to resolve the conflict among the lower federal and state courts as to the application of this Court's ruling in *Commonwealth Coatings*. See Statement of the Case, *supra*, 7-9. If arbitrations are to be accorded respect and the policies in favor of arbitrations fostered, then arbitrations where the trial judge has found that the neutral arbitrator swore a false oath as an arbitrator in obtaining his appointment must be vacated. All the Justices in their separate Opinions in *Commonwealth Coatings* upheld the disclosure obligations of the arbitrator.

The Court of Appeals Opinion also conflicts with its prior leading decision in Celtech, Inc. v. Broumand, 584 A.2d 1257, 1259 (D.C. 1991)(relying on *Commonwealth Coatings*, and holding that evident partiality is shown "where the arbitrator has had dealings *or* relationships with one of the parties that might cause him to be biased."). The Celtech test is a disjunctive standard: either dealings or relationships constitute evident partiality. The Court of Appeals' definition of "evident partiality" under the Arbitration Act is similar to Canon 3(c)(1) of the D.C. Code of Judicial Conduct, which provides in relevant part: "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned ...." Scott v. United States, 559 A.2d 745, 748-49 (D.C. 1989)(emphasis added.) Likewise, in Cellular Radio Corp. v. OKI America, Inc., 664 A.2d 357, 361 (D.C.

1995), the Court of Appeals had reaffirmed its holding in *Celtech* and found no evident partiality where the arbitrator's only failure to disclose in that case concerned his status as opposing counsel to OKI's counsel in some other matter.

This Court should also rule that a neutral arbitrator who conceals an attorney-client relationship with one party , as did Pitofsky, provides *per se* grounds for vacating the award for evident partiality. See, *e.g.*, Parks v. Sombke, supra, 732 A.2d 907; Close v. Motorists Mutual Ins. Co., 486 N.E.2d 1275 (Ohio App. 1985)(failure of arbitrator to disclose attorney-client relationship is grounds to vacate award); DePhillips v. Keystone Insurance Co., 58 Pa.D. & C.2d 183 (1972)(award vacated where one of three AAA arbitrators failed to disclose that he had in the past represented the defendant therein). See also Burlington Northern Railroad Co. v. Tuco Inc., 40 Tex. Sup. Ct. J. 701, 1997 Tex. LEXIS 59, 1997 WL 336314 (Tex. Sup. 1997)(per Justice Thomas R. Phillips, holding that neutral arbitrator's failure to disclose acceptance of a referral from the law firm of a non-neutral arbitrator during the arbitration warrants vacation of award for evident partiality); William C. Vick Construction Co. v. North Carolina Farm Bureau Federation, 123 N.C. App. 97, 472 S.E.2d 346 (N.C. Ct. App. 1996)(reversed and new trial ordered where the AAA arbitrator failed to disclose his "prior dealings" with each of the partners of the law firm representing one party in the arbitration but did describe his relationship with one partner).

II. The Court of Appeals Opinion Should Be Reversed by This Court Before Further Harm is Done to Litigants in Arbitrations

The D.C. Court of Appeals rested its decision on Judge Posner's decision in Merit Insurance Co. v. Leatherby

Insurance Co., 714 F.2d 673 (7th Cir.), *cert. denied*, 464 U.S. 1009 (1983). Merit is an erroneous legal standard directly contrary to Commonwealth Coatings, and is also inconsistent with the prior decisions of this Court. The Chicago judge sought to rationalize his decision in that case with the unfortunate statement that Commonwealth Coatings "provides little guidance because of the inability of a majority of Justices to agree on anything but the result" (714 F.2d at 681). Such legerdemain ought not be embraced. Even apart from that, Merit is readily distinguishable on its facts. In Merit, the Seventh Circuit declined to vacate an arbitral award where the arbitrator had not disclosed an old, short-lived, impersonal employment relationship which was described as "distant," "impersonal," and not social. The Merit arbitration panel consisted of three arbitrators whose award was unanimous. In this case, the arbitration award was vigorously contested by arbitrator Jules Bernstein, Esq. (nominated as arbitrator by Covington & Burling). All of the documentary evidence in the Swidler arbitration showed Petitioner's equity ownership, his signing firm bank guarantees and notes, his voting on admission of other equity members of Swidler & Berlin and participation in firm decisions as to whether or not to merge with a large New York firm, and showed Swidler & Berlin's repeated representations to the courts, the banks and readers of Martindale Hubbell that Petitioner was a member of the firm. An impartial arbitrator would have viewed this evidence as did arbitrator Bernstein, who had no prior relationship with Petitioner. Further, the Merit court found that Leatherby could show no prejudice and that rerunning that arbitration before a different panel was "unlikely to change the outcome." 714 F.2d at 683. Judge Posner doubted that the "AAA would have disqualified Clifford [the third arbitrator]. Merit, 714 F.2d at 680. In contrast, here the AAA expressly testified in the AAA suit that, if Mr. Pitofsky had made the required disclosures, he

would have been disqualified. There is no meaningful resemblance between these two cases even were Merit good law, which it is not.

Defendants sought desperately to explain away the Supreme Court's holding, preferring instead to impose the duty on a plaintiff to discover when an arbitrator is not forthcoming in his arbitrator's Oath. This is another important reason that this High Court should grant the Writ, as the Court of Appeals declined to decide even this critical point of law. (745 A.2d at 340 n.8.) Though disregarded by the District's court of appeals, *Commonwealth Coatings* held that the burden is on the arbitrator to disclose -- not on the victim to hire a detective to ascertain whether the neutral arbitrator is lying. See also Middlesex Mut. Ins. Co. v. Levine, 675 F.2d 1197, 1204 (11th Cir. 1982).

Merit is also quite separate from the case *sub judice* in that the Firm breached its arbitration provision by which the firm agreed in the written members' agreement with Mr. Umana: "any such arbitration shall be conducted in accordance with the rules of the American Arbitration Association." Subsequent decisions of the Supreme Court and circuit courts have further nullified Merit where, as in this case, the arbitration agreement adopts or incorporates standards that go beyond the statutory standards. "[A]rbitration is simply a matter of contract between the parties." First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, at 943 (1995); Volt Information Sciences v. Board of Trustees, 489 U.S. 468, 478-79 (1989)("Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted.");

Lapine Technology Corp. v. Kyocera Corp., 130 F.3d 884 (9th Cir. 1997); Gateway Technologies, Inc. v. MCI Telecommunications Corp., 64 F.3d 993 (5th Cir. 1995).

III. The Court of Appeals Erred in Dismissing Claims Against the Member Defendants for Failure to Prosecute Where the Trial Court Had Already Twice Denied The Motions to Dismiss

The Court of Appeals Opinion affirmed Judge Weisberg's dismissal of the claims against the members for failure to prosecute under SCR-Civ. 41(b). 745 A.2d at 344-345. On April 22, 1997, a Superior Court judge (Weisberg, J.), without hearing or argument, dismissed the claims against the members, and denied plaintiff's cross-motion to compel the defendant members to arbitrate the claims against them. (App. 49-54) The lower court's dismissal for failure to prosecute is abusive and repugnant to our Constitution and jurisprudence on the record where Judge Graae in 1995 had already found that the neutral arbitrator "violated AAA rules and his Oath as an arbitrator." (App. 25, n.2) Judge Weisberg in effect dismissed Plaintiff's claims despite Judge Cushenberry's ruling denying the motion to dismiss (App. 30), despite Judge Graae's declining to dismiss for failure to prosecute, and despite Judge Winfield's September 29, 1995 Order (App. 47-48) expressly denying defendants' motion to dismiss for failure to prosecute. Judge Weisberg explained that his dismissal was "to cure" the "potential jurisdictional defect" (App. 51, n. 6) that led the Court of Appeals earlier (669 A.2d 717) to disclaim appellate jurisdiction. (The Court of Appeals on July 18, 1996 had denied their petition for rehearing or rehearing *en banc* in the prior appeal.) Judge Graae had denied Plaintiff's motion to permit discovery or proceedings against the defendant members, but had declined to dismiss the claims against the members. The neutral

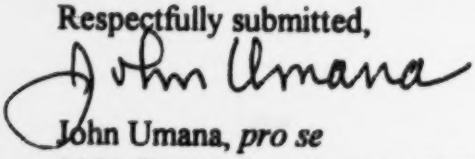
arbitrator, underscoring his partiality, disobeyed Judge Cushenberry's Order and declined to adjudicate anything against his former counselor, Ferguson, or the other members.

In 1995, the member defendants filed a formal 41(b) motion to dismiss for failure to prosecute. On September 29, 1995, Hon. Susan Holmes Winfield, denied their motion to dismiss (App. 47-48), citing Judge Cushenberry's 1990 Order, the Stay that Judge Cushenberry had imposed, and the fact that the case was then on appeal. The Superior Court Order was law of the case. Neither the District's court of appeals nor Judge Weisberg paid heed to Judge Winfield's decision or Judge Cushenberry's decision, which were law of the case. The Court of Appeals appears too not to have taken account of the fact that it had taken eight years until February 17, 2000 to decide the arbitrability of the claims raised in the 1992 appeal, which it ruled on in a footnote. 745 A.2d at 338, n. 5. On this entire record, the dismissal of the claims for failure to prosecute was abusive, and should be reversed by this Court. See Brown v. Cohen, 505 A.2d 77, 78-79 (D.C. 1986); Watkins v. Carty's Automotive Electrical Center, Inc., 632 A.2d 109, 109-110 (D.C. 1993)(41(b) dismissal "is contrary to the emphasis placed by the court on the desirability of assuring the right to be heard on the merits."); and Hackney v. Sheeskin, 503 A.2d 1249, 1253 (D.C. 1986). Petitioner did everything possible to prosecute the claims against the members. It was the neutral arbitrator who, presented with Judge Cushenberry's Order, declined to heed it.

CONCLUSION

For the reasons stated, Petitioner respectfully requests that the Court grant the petition for a writ of certiorari and reverse.

Respectfully submitted,



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APPENDIX A -- OPINION OF THE D.C. COURT OF APPEALS DATED AND DECIDED FEBRUARY 17, 2000

John UMANA, Appellant

v.

SWIDLER & BERLIN, CHARTERED, et al., Appellees

No. 97-CV-694

Argued June 3, 1998
Decided Feb. 17, 2000

Before FARRELL, RUIZ and REID, Associate Judges.

RUIZ, Associate Judge:

This case is before the court for a second time. In his first appeal, John Umana asked the court to vacate an arbitral award in favor of Swidler & Berlin that rejected Umana's principal claim that he was an equity partner in the firm. That appeal was dismissed as having been taken from a non- final order because Umana's claims against eleven individual members of the firm, which were part of his original complaint, were still pending. *See Umana v. Swidler & Berlin*, 669 A.2d 717 (D.C.1995). In this appeal, Umana argues that the trial court erred in denying his motion for a new trial on the question of the neutral arbitrator's bias, following his discovery of new evidence that the arbitrator failed to disclose a significant relationship between the arbitrator and one of the members of the firm (one of the named individual defendants in the complaint filed in Superior Court) who acted as Swidler & Berlin's representative and testified in the

arbitration proceedings. Umana also contends that the trial court erred in dismissing his claims against the individual members of the firm and in ruling that all of his claims were subject to arbitration. With respect to the claim against Swidler & Berlin decided by the arbitrators against Umana, we agree that the claim was subject to the arbitration agreement and conclude that the arbitrator's nondisclosure did not concern a close or financial relationship of the type that would warrant vacatur of the arbitral award. Thus, we affirm the trial court's denial of the motion for new trial and confirmation of the arbitral award. We also affirm the trial court's ruling dismissing the case against the individual defendants for plaintiff's failure to prosecute and, as a result, we need not reach the issue of the arbitrability of Umana's claims against them.

I. Background

As the procedural history of the case is relevant to one of the issues on appeal, we set it out in some detail. In 1989 Umana concurrently filed a complaint in Superior Court against Swidler & Berlin and eleven of its members and a demand for arbitration before the American Arbitration Association (AAA) against Swidler & Berlin only. In 1990, Umana obtained a stay of the arbitration and pursued the litigation. The defendants moved to compel arbitration of all the claims under the arbitration agreement in the Employment Contract between Umana and Swidler & Berlin. [FN1] After the trial court (Judge Cushenberry) ordered that "all of Mr. Umana's claims against all of the defendants" were subject to the arbitration agreement, the litigation was stayed. Umana then proceeded with the AAA arbitration he had demanded against Swidler & Berlin, but did not amend it to include the individual members of the firm.

FN1. The Employment Contract provides in relevant part:

10. Arbitration. Any dispute with regard to any aspect of the relationship between the parties pursuant to this Agreement that cannot be settled by mutual agreement shall be determined by a majority of three arbitrators. Each party shall designate one arbitrator, and the two so selected shall select a third. Any such arbitration proceeding shall be conducted in accordance with the rules of the American Arbitration Association.

Pursuant to the arbitration agreement, each party appointed one arbitrator, and the two appointed a neutral third arbitrator. [FN2] At the conclusion of discovery and after a three-day evidentiary hearing, two of the arbitrators, the one appointed by Swidler & Berlin and the neutral third arbitrator, issued an award on May 15, 1991, rejecting Umana's claim because he "was not a member with tenure of Swidler & Berlin, Chartered," giving three reasons for their conclusion. [FN3] The arbitrators also awarded $50,000 to Swidler & Berlin on a counterclaim, which was later modified by a $4,000 setoff in favor of Umana for interest on a pension account which should have been paid to him upon his departure from the firm. The arbitrator appointed by Umana filed a dissenting statement from the majority's decision that Umana was not a tenured partner of the firm and that he was liable on Swidler & Berlin's counterclaim.

FN2. Umana appointed Jules Bernstein; Swidler & Berlin appointed James Robertson; these two arbitrators selected Robert Pitofsky as the third neutral arbitrator. Pitofsky, who disclosed that he was of counsel to Arnold & Porter and a professor at Georgetown University Law Center, was not opposed by either

party. Umana had been an associate at Arnold & Porter immediately prior to his joining Swidler & Berlin, overlapping with Pitofsky's tenure at A & P.

FN3. The two arbitrators explained that:
a) [Swidler & Berlin] never took actions necessary to make [Umana] a partner with tenure and [Umana] had no reason to believe otherwise
b) If [Umana] at any time had become a partner with tenure at Swidler & Berlin, his transfer of stock back to the firm for consideration extinguished his rights as a partner with tenure; and
c) If [Umana] were a partner with tenure and did not extinguish his rights by the transfer of stock back to the firm, [Umana] is barred from asserting his claims by the doctrine of laches because he failed to take action in a timely manner to protest the firm's decisions with respect to his status.

Umana petitioned the court to vacate the arbitral award, arguing *inter alia* that the matter was not arbitrable and that the third and neutral arbitrator, Robert Pitofsky, was biased because of his relationship with Arnold & Porter. Swidler & Berlin opposed Umana's motion and requested that the arbitral award be confirmed. The trial court (Judge Graae) confirmed the award on June 15, 1992. In rejecting Umana's petition, the trial court agreed with Judge Cushenberry's ruling that the claim was arbitrable and ruled that Umana had waived his claim of Pitofsky's bias based on his relationship with Arnold & Porter because he had not objected to Pitofsky's appointment at the time when Pitofsky disclosed his relationship with the firm. The trial court further ruled that, in any event, it found "nothing in the record that comes even close to demonstrating partiality, much less 'evident partiality,' on Mr. Pitofsky's

part." Umana then filed his first appeal, arguing that his claims were not subject to arbitration and that the award should be set aside because of Pitofsky's partiality. While the appeal was pending in this court, Umana sought to supplement the record before this court and also filed a Superior Court Civil Rule 60(b) motion with the trial court based on newly discovered evidence of Pitofsky's bias. [FN4] This court denied the motion to supplement, but permitted the Rule 60(b) motion under *Smith v. Pollin*, 90 U.S.App.D.C. 178, 180, 194 F.2d 349, 350 (1952) ("when an appellant in a civil case wishes to make a motion for a new trial on the ground of newly discovered evidence while his appeal is still pending, the proper procedure is for him to file his motion in the trial court.")

> FN4. The evidence came from the deposition of John Ferguson taken in the course of litigation initiated by the AAA against Umana to recover his share of the arbitrator's fees. Specifically, Umana proffered evidence from the deposition that Pitofsky's service at the Federal Trade Commission during the early 1970's had coincided with the two year service at the FTC of John Ferguson, a member of Swidler & Berlin who was a witness at the arbitration hearing and acted as the firm's representative at the hearing. Umana also claimed that Ferguson had acted as Pitofsky's attorney on an important matter while Ferguson was at the FTC and that, subsequent to his departure from the agency, Ferguson had appeared before the FTC at a time when Pitofsky was a commissioner, in a proceeding where the Commission had ruled in favor of Ferguson's client concerning a motion to disqualify counsel, who was a partner of Ferguson.

In a June 16, 1995, order, the trial court denied Umana's Rule 60(b) motion for a new trial and refused the request to

reopen the record for new discovery and admit new evidence. Quoting from *Health Servs. Management Corp. v. Hughes*, 975 F.2d 1253, 1264 (7th Cir.1992), Judge Graae concluded that Umana had failed to meet his burden that Pitofsky's alleged partiality was "direct, definite, and capable of demonstration, rather than remote, uncertain or speculative." In a footnote, the order stated that "there [did not] appear to be a dispute that Mr. Pitofsky's failure to make th[e] disclosure [concerning Ferguson] violated AAA Rules and his oath as an arbitrator."

While the first appeal was still pending, the individual defendants moved in April 1995 to dismiss the claims against them for lack of prosecution through arbitration. The trial court (Judge Winfield) ruled that it lacked jurisdiction while Umana's appeal was pending before the Court of Appeals.

On December 19, 1995, we dismissed Umana's first appeal for lack of jurisdiction because the claims against the individual defendants were still pending. *See Umana*, 669 A.2d at 723-24. Shortly after the dismissal, Umana's counsel advised the individual defendants that they should ready themselves for trial in Superior Court. Some eight months later, Umana's new counsel (and counsel in this appeal) again advised of Umana's intention to proceed against the individual defendants in Superior Court. The individual defendants asserted that they adhered to their previous position, i.e., that the claims were arbitrable and were subject to dismissal for lack of prosecution. Nothing further appears to have happened until March 5, 1997, when the individual defendants renewed their motion to dismiss the claims against them for failure to prosecute in accordance with Judge Cushenberry's 1990 order that the claims were

subject to arbitration. Umana moved for a default judgment against the individual defendants in the Superior Court action, or, alternatively, for an order compelling them to submit to arbitration in thirty days. Noting that "[s]even years have passed since [Umana] was ordered to arbitrate all of his claims" and that he had "taken none of the procedural steps necessary to arbitrate his claims against the individual defendants," the trial court (Judge Weisberg) granted the motion dismissing the individual defendants and entered a final judgment in favor of Swidler & Berlin. It is from this final judgment against all of the defendants that Umana now appeals.

II. Vacation of the Arbitral Award [FN5]

FN5. In this appeal Umana incorporates the arguments from his first, dismissed appeal, that he did not agree to submit to arbitration all of his claims against the defendants. In his briefs in the first appeal, Umana argued that arbitration of his claim against Swidler & Berlin concerning his status as a partner (owner) of the firm was not "pursuant to" the Employment Agreement he signed with the firm some three months after they had agreed he would be a partner. See supra, note 1. Further, Umana claimed that arbitration of his claim against Swidler & Berlin is against public policy because the firm was motivated to act against him as a result of his contention that Ferguson's representation of a client violated the Rules of Professional Conduct. He also argued that his claim that individual members of Swidler & Berlin breached their fiduciary duties to him were separate from, and not included in, the matters that were the subject of the arbitration agreement between him and the firm. The defendants contend that Umana's failure to brief any of those arguments in this appeal violates District of Columbia Appellate Rule 28(a) and constitutes a waiver,

citing *Brown v. United States*, 675 A.2d 953, 955 (D.C.1996) (declining to consider arguments in briefs filed by appellants in a different case which appellant attempted to incorporate by reference). Even assuming that Umana's claims are preserved and properly before us, we agree with the trial court that the broad language of the arbitration clause in the Employment Agreement covers Umana's claim against Swidler & Berlin that he was wrongfully deprived of his partnership at the firm. *See Carter v. Cathedral Avenue Coop., Inc.*, 566 A.2d 716, 717 (D.C.1989) ("arbitration clauses should be broadly construed") (citing *AT & T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 650, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986)). Although Umana has alleged that it was his advertence to an ethical lapse that motivated his ouster from the firm's membership, there is no indication in the record that Umana pursued the matter by bringing it to Bar Counsel. In any event, the caution surrounding submission to arbitration of matters involving public policy, such as antitrust violations, does not preclude arbitrators from considering the impact of an issue affected with public policy concerns in the context of a matter that clearly is subject to arbitration. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985) (holding federal antitrust laws do not prohibit parties from agreeing to arbitrate antitrust claims arising out of international commercial transactions and questioning the underlying theory that public interest in enforcement of antitrust laws makes antitrust claims inappropriate for arbitration); *Rodriguez de Quijas v. Shearson/ American Express, Inc.*, 490 U.S. 477, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989) (overruling an earlier decision that an agreement to arbitrate under the Securities Act of 1933 is unenforceable); *Shearson American Express, Inc. v. McMahon*, 482 U.S.

104 L.Ed.2d 526 (1989) (overruling an earlier decision that an agreement to arbitrate under the Securities Act of 1933 is unenforceable); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987) (permitting arbitration of claims under the Securities Exchange Act of 1934 and the Racketeer Influenced and Corrupt Organizations Act). In light of our affirmance of the trial court's dismissal of the claims against individual members of the firm, see infra, we need not reach the substance of Umana's argument that the claims against them should have been litigated, not arbitrated, as they have been forfeited by Umana's failure to prosecute them.

In this appeal, Umana's principal argument is that the arbitral award should be set aside due to the bias of the neutral third arbitrator, Robert Pitofsky. He argues that the trial court's statement in denying the Rule 60(b) motion for a new trial, that Pitofsky's failure to disclose his prior relationship with Ferguson violated both the AAA Rules requiring disclosure and the oath he took as an arbitrator, had two legal effects: 1) it demonstrated Pitofsky's "evident partiality" sufficient for vacation of the award under D.C.Code § 16-4311(a)(2), and 2) it rendered the award ineffective as a matter of contract law because the agreement required that the arbitration be "in accordance with" the AAA Rules which the trial court found Pitofsky to have violated. Umana further argues that Pitofsky's actions in conducting the arbitration, particularly in his rulings concerning discovery, prove that he was biased in favor of the defendants. Umana places most of his reliance on language from *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 89 S.Ct. 337, 21 L.Ed.2d 301 (1968), that an arbitrator is required to "disclose to the parties any dealings that might

create an impression of possible bias," *id.* at 149, 89 S.Ct. 337, and that "failure of an arbitrator to volunteer information about business dealings with one party will, prima facie, support a claim of partiality or bias." *Id.* at 154, 89 S.Ct. 337 (Fortas, J., dissenting). We disagree with these contentions. [FN6]

FN6. Umana also argues that Pitofsky should be held to a more stringent standard applicable to judges because, in the AAA litigation against Umana to recover his share of the arbitrators' fees, see *supra* note 4, the arbitrator claimed immunity in moving to quash a subpoena concerning his performance in this arbitration. Although we have never ruled on the issue, we see no immediate connection between the availability of immunity to an arbitrator and the applicable standard for judicial intervention to vacate an arbitral award. Moreover, even if judicial standards applied, it is likely that a judge would not be precluded from deciding a case in the circumstances presented here. *See Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 680 (7th Cir.1983) (citing *Chitimacha Tribe of Louisiana v. Harry L. Laws Co.*, 690 F.2d 1157, 1166 (5th Cir.1982)).

Evident Partiality

Under the District of Columbia Uniform Arbitration Act, *see* D.C.Code §§ 16-4301 to -4319 (1997) (DCUAA), judicial review of arbitral awards is extremely limited. We do not have authority to set aside an arbitral award based on our review of the merits of the arbitrators' decision. Rather, the statute permits vacation of an arbitral award for only certain limited reasons. *See* D.C.Code § 16-4311. Even were the court to set aside an arbitral award for a statutory reason (other than the absence of an agreement to arbitrate), it may not then decide the merits of the controversy. *See*

D.C.Code § 16-4311(c). The remedy is to order a new arbitration. [FN7] See *id.* The party applying to the court for vacation of an arbitral award bears a "formidable" burden, *Celtech, Inc. v. Broumand*, 584 A.2d 1257, 1258-59 (D.C.1991), and, if the ground pressed concerns the performance of the arbitrator, must show "specific facts which indicate improper motives on the part of the arbitrator." Id. at 1259 (quoting *Sheet Metal Workers Int'l Ass'n Local Union No. 420 v. Kinney Air Conditioning Co.*, 756 F.2d 742, 745 (9th Cir.1985)). Umana's showing does not meet that standard.

FN7. Umana's Rule 60(b) motion, the denial of which is on appeal, was for relief from the previously entered judgment affirming the arbitral award. We interpret the relief requested as for a new trial on the issue of the arbitrator's bias or for a new arbitration, at least as to those claims which Umana does not dispute were subject to the arbitration agreement.

First, even assuming that Pitofsky should have disclosed his relationship with Ferguson under the AAA Rules, a contention we see no reason to dispute, [FN8] his nondisclosure does not automatically translate to "evident partiality" warranting reversal under the statute. The relevant inquiry concerns not only the fact of the nondisclosure, but the nature of the relationship between Pitofsky and Ferguson. In this regard, we agree with the trial court's conclusion that the professional relationship that was created between them beginning during the two year period that both served within different bureaus of the FTC (some twenty years before the arbitration in question), and appears to have continued on a sporadic basis thereafter, is not the kind that threatens bias justifying vacation of the arbitral award. [FN9] *See Cellular Radio Corp. v. OKI*

Am. Inc., 664 A.2d 357, 360-61 & n. 5 (D.C.1995)*341 (citing *Celtech*, 584 A.2d at 1259) (to warrant vacation of an arbitral award, "the bias must be due to some financial interest or other loyalty owed to one side of the dispute").

FN8. Swidler & Berlin argues that Pitofsky was under no obligation to disclose a matter of public record, and that Umana had a duty under the AAA Rules to investigate known facts about the arbitrator for possible disqualification. For this reason, Swidler & Berlin also argues that the evidence presented by Umana in his Rule 60(b) motion was not "newly discovered." Although we do not decide the issue, we are loathe to impose on a party a duty to investigate, rather than on the arbitrator, the duty to make full disclosure. "If arbitrators err on the side of disclosure, as they should, it will not be difficult for courts to identify those undisclosed relationships which are too insubstantial to warrant vacating an award." *Commonwealth Coatings*, 393 U.S. at 152, 89 S.Ct. 337 (White, J., concurring).

FN9. The trial court stated:
The court has read all 286 pages of Mr. Ferguson's deposition and finds little or no evidence for the relationship plaintiff claims. Indeed, it is evident that plaintiff has tried to place a sinister and conspiratorial gloss on neutral or innocent events. The record supports the trial court's conclusion. Ferguson testified at a deposition in the AAA litigation, see supra note 4, concerning his relationship with Pitofsky as follows: *Evidence of a Ferguson-Pitofsky Relationship in 1970-72*. Soon after Ferguson joined the FTC in "later spring or early summer of 1970" as assistant to the director of the Bureau of Competition, Pitofsky began to work at the FTC in late fall of 1970 as head of the

Bureau of Consumer Protection. During the deposition counsel for Umana insistently queried Ferguson about whether he and Pitofsky might have been on a first-name basis during that time. Ferguson testified as follows: we had virtually nothing to do with each other during the time that I was in the Bureau. So our paths crossed very infrequently. He was a Bureau director and, therefore, the senior person. I certainly would have known him. Whether he would have known me or been one of the people who he regarded as memorable at that time. I can't say. After Ferguson became assistant general counsel of the FTC in the spring of 1971, on occasion Ferguson and Pitofsky were present at the same weekly FTC meetings. Ferguson drafted the FTC appellate brief in litigation concerning the FTC's "octane rule" for the Bureau of Consumer Protection, and submitted the penultimate draft of that brief to Pitofsky and at least three other FTC officials for comment. A small group of FTC officials including Ferguson and Pitofsky had a brief, informal discussion about the brief. Ferguson left the FTC in the summer of 1972, and the appeal was argued by another lawyer. Ferguson and Pitofsky also both worked on two other FTC projects (referred to as "KidVid" and "cereal"), in "very different" roles. Ferguson acknowledged writing "very few" memos to the Bureau of Consumer Protection, conceivably as many as 25. *Evidence of a Ferguson-Pitofsky Relationship around 1980* After he left the FTC, Ferguson was lead counsel for the defendants in the Fruehauf/Kelsey-Hayes merger case both before the FTC and on appeal to the Second Circuit. Pitofsky was named an FTC commissioner some time after this case was argued before the FTC. Ferguson was also lead counsel on the Brunswick case, which was never argued orally before the FTC, and was later affirmed by the Eighth Circuit. Ferguson stated that

> he had no memory of whether or not Pitofsky was on the Commission at the time of the Brunswick decision, but in fact, Pitofsky authored the FTC opinion. Pitofsky was also listed as a commissioner on an order of the FTC denying a motion to disqualify counsel in that case. The motion concerned another former FTC official working at Ferguson's firm, not Ferguson himself.
> *Evidence of a Ferguson-Pitofsky Relationship at Firm Parties* When Ferguson was asked which government officials would have been invited to the firm's party following the spring antitrust Bar Association meeting, his response was: a pretty inclusive list. You invite most of the ... [Department of Justice Antitrust Division and FTC officials] that are listed in the telephone directory.... The positions, not the people, but the positions, and then we would often include people less senior in position in the Commission and you include commissioners and their assistants. It was a pretty comprehensive list of people.

In *Merit Ins.*, a case with facts highly analogous to those of this case, Judge Posner stated that:

> the test in this case is not whether the relationship was trivial; it is whether, having due regard for the different expectations regarding impartiality that parties bring to arbitration than to litigation, the relationship between Clifford [the arbitrator] and Stern [party to the arbitration] was so intimate--personally, socially, professionally, or financially--as to cast serious doubt on Clifford's impartiality. Although Stern had been Clifford's supervisor for two years and was a key witness in an arbitration where the stakes to the party of which he was the president and principal shareholder were big, their relationship had ended 14 years before,

> Clifford had no possible financial stake in the outcome of the arbitration, and his relationship with Stern during their period together at Cosmopolitan had been distant and impersonal. The fact that they had never socialized, either while working for the same company or afterward (though both were practicing law in Chicago all this time), indicates a lack of intimacy.

714 F.2d at 680.

Judge Posner noted that *Commonwealth Coatings* "provides little guidance because of the inability of a majority of Justices to agree on anything but the result," id. at 681, and after reviewing other courts' applications of that case, determined that

> [a]lthough it is difficult to extract from the cases more than a mood, the mood is one of reluctance to set aside arbitration awards for failure of the arbitrator to disclose a relationship with a party.

Merit Ins., 714 F.2d. at 682.

Judge Posner concluded,

> [t]o uphold the district court's vacation of the arbitration award in the absence of evidence of actual or probable partiality or corruption would open a new and, we fear, an interminable chapter in the efforts of people who have chosen arbitration and been disappointed in their choice to get the courts--to which they could have turned in the first instance for resolution of their disputes--to undo the results of their preferred method of dispute resolution.

Id. at 683.

Our jurisprudence similarly follows a narrow interpretation of the rule in *Commonwealth Coatings*. Although this is the first case in which we have considered

nondisclosure of a prior collaborative relationship between an arbitrator and a participant in the arbitration, our analyses to date have focused on evidence of concrete, current or close links. *See Cellular Radio*, 664 A.2d at 360-61 (in case where arbitrator failed to disclose that he and counsel representing a party had been adversaries in two previous unrelated cases, nondisclosure of relationship did not warrant vacatur because the bias asserted "must be due to some financial interest or other loyalty owed to one side of the dispute"); *Celtech*, 584 A.2d at 1259 (in case where arbitrator's impartiality was challenged for failure to explain basis for award, vacatur unwarranted where no attempt was made to show "close financial relations for many years" or a close personal relationship). In this case, Umana does not assert that Pitofsky had a financial interest in the arbitration or any of the parties to it. [FN10] He certainly has attempted, however, to present a case that Pitofsky was partial to Ferguson--and by implication to Swidler & Berlin--as a result of a camaraderie that was engendered during the two years they both served at the FTC. Absent more specific evidence of a close relationship between the arbitrator and an interested participant, it is difficult to imagine that the parties' expectations of impartiality were seriously undermined by such a common occurrence in the legal circles in the District of Columbia where the parties, their counsel [FN11] and the arbitrators practice. *See Merit Ins. Co.*, 714 F.2d at 680.

FN10. Umana argues that as of counsel to Arnold & Porter, Pitofsky had a financial interest in the issue of the portable business Umana took with him when he left Arnold & Porter to join Swidler & Berlin. At that point, Umana asserts, Pitofsky had an ethical obligation to recuse from the arbitration proceeding. Umana can be deemed to have waived the objection as he did not then

request that Pitofsky step aside as the "neutral" arbitrator. *See Cellular Radio Corp.*, 664 A.2d at 359 n. 3. Umana was well aware that Pitofsky had a relationship with Arnold & Porter as Umana's association with the firm overlapped with Pitofsky's. In any event, Pitofsky had disclosed his relationship with Arnold & Porter.

FN11. Swidler & Berlin was represented by Jamie Gorelick; Jacob Stein represented Umana.

Umana also claims that Pitofsky's conduct of the arbitration shows that he was biased in favor of the defendants. Specifically, he points out that the arbitrator 1) permitted issuance of subpoenas requested by the defendants for performance evaluations of Umana while he was at Arnold & Porter, the law firm with which the arbitrator was affiliated at the time of the arbitration and in which Umana had been an associate before joining Swidler & Berlin; [FN12] 2) permitted, over objection, that Umana be cross-examined concerning his "portable business," the Arnold & Porter clients that did (or did not) follow him to Swidler & Berlin; 3) denied Umana's request for discovery of certain bank documents he asserted showed his status as an equity partner of Swidler & Berlin, and 4) failed to decide Umana's claim that Swidler & Berlin wrongfully terminated him in violation of public policy when he brought to the partnership's attention that Ferguson's representation of a client was in conflict with the firm's duty to the class action clients Umana represented while at Swidler & Berlin. Appellees deny the factual underpinnings of the first and last of Umana's contentions.

FN12. Umana asserts that Arnold & Porter responded to the subpoena even before it was issued, apparently

suggesting that the arbitrator informally communicated the discovery request to his firm or exerted pressure over his firm to promptly comply with the subpoena.

We do not generally infer partiality from the arbitrator's discovery rulings. *See Cellular Radio Corp.*, 664 A.2d at 363. An arbitrator's substantive conduct during the proceedings may be used to show bias only in those "extreme and unusual circumstances" where the arbitrator can fairly be said to "manifest infidelity to the law and a deliberate disregard of it." *Celtech*, 584 A.2d at 1260. The rulings (or failure to rule) that Umana claims evidence the arbitrator's partiality cannot be so characterized.

First, a review of the record reveals that the issue of Umana's performance at his prior firm (Arnold & Porter) and at Swidler & Berlin was relevant to the issue of the terms of his partnership status at Swidler & Berlin. Second, Umana's claim that the arbitrator's bias was demonstrated in his discovery rulings is not supported by the record. After Swidler & Berlin produced certain documents in answer to Umana's discovery request, and Umana complained they were not responsive, the arbitrator denied Umana's request to compel further production of documents based on Swidler & Berlin's objection on grounds of vagueness and overbreadth. Umana argues that, as a result, Swidler & Berlin withheld crucial documents--a note and continuing guarantee to Sovran Bank he had signed--that demonstrated his partnership status in the firm. [FN13] When Umana obtained the documents directly from the bank subsequent to the arbitration hearing they were admitted into evidence in the arbitration, but the arbitrators did not permit reopening of the hearing for further cross-examination of Swidler & Berlin representatives based on the documents.

FN13. Surprisingly, it appears that Umana, who had signed the bank documents he claims Swidler & Berlin improperly withheld, never identified those documents in his request to the firm for production of documents. As the trial court noted when it denied Umana's first request to set aside the arbitral award due to the arbitrator's partiality, Umana knew of the existence of the documents because he had signed them and was able to obtain copies on his own. Thus, "Umana did not need to discover the documents from Swidler and, thus, the arbitrators did not stand in his way."

Third, with respect to the claim that Pitofsky failed to rule on Umana's counterclaim for wrongful termination due to Pitofsky's presumed reluctance to touch on Ferguson's alleged conflict of interest, we note that the arbitrators' award purported to decide the matter in its entirety, stating that it was "in settlement of all claims submitted in this arbitration." Although the arbitral award must be in writing, see D.C.Code § 16-4308(a), the arbitrators' failure to explicate the award is not a basis to show partiality as arbitrators are not required to set out the reasons for the award. *See Celtech*, 584 A.2d at 1257. Were Umana's interest in ascertaining that his claim of wrongful termination was not overlooked--for whatever reason--he would be expected to bring the apparent oversight before the arbitrators or the trial court to compel decision on the matter. It will not do, however, to save an objection that could have been asserted during the arbitration and use it later as a basis to set aside the arbitral award asserting the arbitrators' evident partiality. *See Cellular Radio Corp.*, 664 A.2d at 359 n. 3. [FN14]

FN14. Swidler & Berlin asserts that Umana did not separately make a claim for wrongful termination, but

that Umana argued that his objection to Ferguson's conflicting representation was the motivation for the firm's decision to demote him from equity partner status. We have no need to decide whether a demotion, as opposed to a termination, can give rise to a claim that the employer's action was in violation of public policy and whether the Rules of Professional Conduct provide such public policy. *See Carl v. Children's Hospital*, 702 A.2d 159, 165 n. 9 (D.C.1997) (en banc) (noting, without deciding, that report of violation of Rules of Professional Conduct could form basis for a claim of wrongful termination). Also at issue is the important public policy in favor of enforcing agreements to arbitrate. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 35, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991) (holding that, absent express legislative intent in the Age Discrimination in Employment Act, the fact that the statute evinces a policy choice of the legislature by providing a cause of action does not preclude arbitration of a statutory claim, consistent with the "liberal federal policy favoring arbitration agreements" reflected in the Federal Arbitration Act); *see also Masurovsky v. Green*, 687 A.2d 198, 201 (D.C.1996) (citing the "well-established preference for arbitration when the parties have expressed a willingness to arbitrate," and holding the policy favoring arbitration is identical under the DCUAA and the Federal Arbitration Act). Whatever the precise contours of Umana's presentation to the arbitration panel, we note that even the dissenting arbitrator, the one selected by Umana, did not mention Umana's claim based on public policy, suggesting that even he thought it either meritless or not before the arbitration panel.

Breach of Contract

Umana's second contention is that Pitofsky's failure

to make a disclosure required by the AAA Rules as a matter of law invalidated the award because the arbitration agreement required that "any such arbitration proceeding shall be conducted in accordance with the rules of the American Arbitration Association." We understand the argument to be that Pitofsky's nondisclosure in violation of the AAA Rules was a breach of the contract of the parties that the "arbitration proceeding"--which would include, presumably for this purpose, the arbitrator's disclosure--be conducted as required by the AAA Rules. The argument raises difficult issues concerning the court's authority to vacate an arbitral award, on grounds other than provided by the DCUAA, pursuant to the agreement of the parties. *See Umana*, 669 A.2d at 721-22 (noting court's jurisdiction to review order under the DCUAA); *Grad v. Wetherholt Galleries*, 660 A.2d 903, 907 n. 8 (D.C.1995) (citing *First Options, Inc. v. Kaplan*, 514 U.S. 938, 943, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995) (noting consensual nature of agreement to arbitrate)). But *see Merit Ins. Co.*, 714 F.2d at 681 (holding that to succeed in setting aside an arbitration award under the United States Arbitration Act and Rule 60(b) of the Federal Rules of Civil Procedure, a party must bring itself within the statute and the rule). Even assuming, however, that the parties could by contract dictate the court's scope of review of an arbitral award, usual notions of contract law would require that to lead to a remedy as drastic as vacation of an arbitral award the breach would have to be material. In evaluating the materiality of Pitofsky's nondisclosure, we see no reason to depart from the jurisprudence that defines the type of undisclosed relationship material enough to justify vacation of an award for "evident partiality" under the statute. Parties to a contract of arbitration are deemed to know the relevant statutory law and jurisprudence concerning judicial review; this would be particularly so in the case of attorneys. Therefore, absent any express indication in the contract that the parties intended that

they would not be bound by an arbitral award for reasons other than as provided by the law of the District of Columbia which governed the contract, we do not perceive in this case the basis for a legal argument separate from the one made under the statute, which we have rejected.

III. Dismissal of Individual Defendants

After this court dismissed the first appeal in 1995 because it was not taken from a final order as Umana's claims against the individual members of the firm had not been heard or decided, the trial court dismissed those claims in 1997 for failure to prosecute. The trial court explained that Umana's complaint having been filed in 1989, the court having ruled in 1990 that all of Umana's claims were subject to arbitration, and Umana's first appeal from the trial court's confirmation of the award having been dismissed in 1995, Umana's complaint against the individual members had been pending for seven years under order to arbitrate, during two of which--since this court's dismissal in 1995--it had been pointed out that those claims were pending and unresolved. The court noted that Umana had done nothing to bring to arbitration his claims against the individual defendants. Such delay, the trial court reasoned, entitled the individual defendants to dismissal of the claims against them, particularly as Umana could give no reason for his failure to pursue the claims. We review the trial court's dismissal for failure to prosecute under Superior Court Civil Rule 41(b) for abuse of discretion. *See White v. Washington Metro. Area Transit Auth.*, 432 A.2d 726, 728 (D.C.1981).

On appeal, Umana argues that the trial court's dismissal was an abuse of discretion because he was hampered in his efforts by the individual defendants' refusal to arbitrate. The trial court considered, and discredited, this claim in light of the record showing Umana's consistent position that his claims against the individual defendants

were not subject to arbitration, and that it was the defendants who had obtained the order compelling arbitration. Whatever Umana's legal position may have been regarding the proper forum for his claims against the individual firm members, however, he did not have the option to do nothing at all. Once the trial court ordered arbitration, he should have moved earlier to compel the arbitration if the defendants were recalcitrant, at which point either he would have had recourse to contempt if the defendants continued to refuse, or, once the arbitration was completed, he could have applied to vacate the award on the ground that his claims against the individual defendants were not subject to the arbitration agreement. Under these circumstances, we perceive no abuse of discretion in the trial court's dismissal of the claims against the individual defendants for Umana's failure to submit those claims to arbitration, as he had been ordered to do. *See District of Columbia v. Serafin*, 617 A.2d 516, 519 (D.C.1992) (noting trial court authority to dismiss an action when plaintiff fails to comply with court order).

For the foregoing reasons, the trial court's denial of the Rule 60(b) motion for new trial, ruling that Umana's claim against Swidler & Berlin was subject to arbitration, confirmation of the arbitral award, and dismissal of the individual defendants are

Affirmed.

APPENDIX B -- ORDER OF D.C. SUPERIOR COURT (JUDGE GRAAE) DATED AND DECIDED JUNE 16, 1995

JOHN UMANA, Plaintiff

v.

SWIDLER & BERLIN, CHARTERED, et al., Defendants.

No. 89-CA-12531

On June 17, 1992, this Court, after a hearing on all the issues raised by plaintiff, denied his motion to vacate the award arbitrators had entered in Swidler and Berlin's favor. The Court found no merit in plaintiff's principal claim that Mr. Robert Pitofsky, the neutral arbitrator, had been biased against him. Plaintiff thereupon appealed this Court's refusal to vacate the arbitration award. While pending appeal, plaintiff sought to reopen the record to present purportedly newly discovered evidence establishing a relationship between John Ferguson, a defendant in the case, and Mr. Pitofsky, which the latter had failed to disclose.

The Court of Appeals referred plaintiff to the case of Smith v. Pollin, 90 U.S. App. D.C. 178, 194 F.2d 349 (1952), suggesting that the issue of newly discovered evidence be taken up with the trial court. Plaintiff has filed a motion for new trial, presenting in support the evidence which the Court of Appeals advised could only be considered by the trial court. This Court has jurisdiction to consider plaintiff's motion for a new trial. In the event this Court concludes a new trial is merited, steps can be taken to have the case remanded for that purpose.

Basis for Plaintiff's Motion to Reopen

Following the underlying arbitration in this case, the American Arbitration Association sued Mr. Umana for his share of the fees for arbitrating his claim against Swidler and Berlin.1 In connection with that suit, Mr. Umana took the deposition of John R. Ferguson, a defendant in Mr. Umana's suit against Swidler and Berlin and the firm's representative at the arbitration proceeding. It is on the basis of this deposition that plaintiff seeks to reopen his case.

In essence, what plaintiff asserts is that Mr. Ferguson and Mr. Pitofsky had a close personal and professional relationship for twenty years which the latter failed to disclose before he was selected as neutral arbitrator and while the arbitration was underway. That Mr. Pitofsky failed to disclose he knew Mr. Ferguson is apparently not in dispute.2 What is at issue is whether the relationship between the men is as plaintiff claims and, thus, whether there is evidence of bias on Mr. Pitofsky's part.

Mr. Pitofsky and Mr. Ferguson both served on the staff of the Federal Trade Commission during 1970-72, Mr. Pitofsky as Director of the Bureau of Consumer Protection and Mr. Ferguson, first, as Assistant to the Director of the Bureau of Competition and, then, as an Assistant General Counsel to the Commission. Plaintiff claims Mr. Ferguson's deposition "details pervasive, concealed relationships between the arbitrator, his law firm and defendant Ferguson since 1970,"

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1 See American Arbitration Association v. Umana, CA-16615-92.

2 Nor would there appear to be a dispute that Mr. Pitofsky's failure to make this disclosure violated AAA rules and his oath as an arbitrator.

(Motion, pg. 3) and "significant dealings and relationships for 20 years which both kept hidden..." (Motion, pg. 16).

The Court has read all 286 pages of Mr. Ferguson's deposition and finds little or no evidence for the relationship plaintiff claims. Indeed, it is evident that plaintiff has tried to place a sinister and conspiratorial gloss on neutral or innocent events. A few examples serve to make the point:

(1) Plaintiff claims that Ferguson and Pitofsky developed a close professional and personal relationship because they worked together at the FTC and were on a first name basis. What the record shows is that they worked in different sections of the agency and that their paths may have crossed episodically at weekly commission meetings and only from "time to time" because each department's or bureau's staff would not arrive at meetings until their items were slated to be discussed, after which they would leave (Depo. at 30, 41, 41). Mr. Ferguson did not recall ever asking Mr. Pitofsky a question at these meetings or talking with him outside of the meeting room (Depo. at 117-118), other than to say "hello" if they passed each other in a hallway. (Depo. 31-32). There is nothing in Mr. Ferguson's deposition to suggest he ever had a social relationship with Mr. Pitofsky (see Depo. at 71-78).

(2) Plaintiff asserts that "Mr. Ferguson had served as Mr. Pitofsky's lawyer," (Motion, pg. 6) when, as Assistant General Counsel, he worked on the "octane ratings" rule prepared by Mr. Pitofsky's Bureau of Consumer Protection (Motion, pg. 8). What the record shows is that Mr. Ferguson wrote the appeal brief for the FTC when the "octane ratings" rule was challenged in court (Depo. at 57-59) and had a brief meeting with Mr. Pitofsky and his staff regarding their comments on the brief (Depo. at 65). To suggest this created an attorney/client relationship between Mr. Ferguson and Mr. Pitofsky is to read far more into the record than it can bear.

(3) Plaintiff implies there was a special relationship

between Mr. Pitofsky and Mr. Ferguson when the latter was representing clients before the FTC between 1978 and 1981 while Mr. Pitofsky was an FTC Commissioner. Two cases were discussed at Mr. Ferguson's deposition: the Feuhauf-Kelsey-Hayes merger (Depo. 145-150) and the Brunswick case (Depo. 160-179). As to the Fruehauf case, the FTC ruled against Mr. Ferguson's client, forcing him to take the case to the Second Circuit where the Commission's decision was reversed and the case dismissed without remand. As to the Brunswick case, an attempt by the opposing party to have Mr. Ferguson disqualified from the case was unanimously rejected by the FTC in an opinion written by Mr. Pitofsky -- a decision validated years later by the Eighth Circuit. In short, there is nothing in this record to show anything other than neutrality in Mr. Pitofsky's dealings with cases Mr. Ferguson had before the Commission.

Plaintiff's Burden

There is no doubt that it would have been far better if Mr. Pitofsky had made the required disclosure of his prior contacts with Mr. Ferguson. Indeed, much of this post-arbitration litigation probably could have been averted had he done so. However, plaintiff's burden -- as it has always has been -- is to show "corruption or gross mistake; an error of judgment will not do." Celtech, Inc. v. Broumand, 584 A.2d 1257, 1258 (D.C. 1991). Putting it differently, the alleged partiality must be "direct, definite, and capable of demonstration, rather than remote, uncertain, or speculative." Health Services Management Corp. v. Hughes, 975 F.2d 1253, 1264 (7th Cir. 1992). Plaintiff simply has not met his burden of moving his claims beyond the speculative.

Conclusion

In view of the foregoing, the Court rules as follows:

(1) Plaintiff's request to have the transcript of Mr. John R. Ferguson's deposition and related exhibits made part of the record in this case is **GRANTED**.

(2) Plaintiff's request to reopen the record to permit additional discovery or submission of other new evidence is **DENIED.**

(3) Plaintiff's motion for new trial is **DENIED.**

It is so ORDERED this 16th day of June, 1995.

s/ Steffan W. Graae
STEFFAN W. GRAAE
Associate Judge

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APPENDIX C -- OPINION OF THE D.C. COURT OF APPEALS DATED AND DECIDED FEBRUARY 13, 2001, DENYING APPELLANT'S PETITION FOR REHEARING EN BANC

John UMANA, Appellant

v.

SWIDLER & BERLIN, CHARTERED, et al., Appellees

No. 97-CV-694

BEFORE: Wagner, Chief Judge; Terry, *Steadman, Schwelb, Farrell, Ruiz, Reid, Glickman, and Washington, Associates Judges.

ORDER

On consideration of appellant's *pro se* petition for rehearing en banc, and the response thereto; and it appearing that no judge of this court has called for a vote on the petition for rehearing en banc, it is

ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

*Associate Judge Steadman has recused himself from this case.

APPENDIX D -- ORDER OF D.C. SUPERIOR COURT (JUDGE CUSHENBERRY) DATED AND DECIDED MAY 4, 1990

JOHN UMANA, Plaintiff

v.

SWIDLER & BERLIN, CHARTERED, et al., Defendants.
No. 89-CA-12531

ORDER

This matter comes before the Court on Defendants' Joint Motion To Dismiss The Complaint pursuant to Superior Court Civil Rule 12(b) (1) In Favor Of Arbitration, and In The Alternative To Dismiss Count Four Pursuant To Superior Court Rules 9(b) and 12(b)(6) and the opposition thereto, it is this 4th day of May, 1990,

ORDERED, that the Motion To Compel Arbitration be and hereby is GRANTED, this Court having concluded that all of Plaintiff's claims in the complaint are subject to mandatory arbitration under the extremely broad arbitration clause negotiated between the parties. Carter v. Cathedral Avenue Cooperative, Inc., supra, 566 A.2d 716, 717 (D.C. 1989), and it is further,

ORDERED, that the Motion To Dismiss be and hereby is DENIED, and it is further,

ORDERED, that this action be and hereby is STAYED pending mandatory arbitration of all claims in the complaint pursuant to D.C. Code §16-4302.

s/ Harold Cushenberry
Judge H. Cushenberry

APPENDIX E -- AWARD OF ARBITRATORS DATED AND DECIDED MAY 15, 1991

In the Matter of the Arbitration between
JOHN UMANA
AND
SWIDLER & BERLIN CHARTERED

CASE NUMBER: 16 199 00669 89P

AWARD OF ARBITRATORS

WE, THE UNDERSIGNED ARBITRATORS, HAVING BEEN DESIGNATED IN ACCORDANCE WITH THE Arbitration Agreement entered into by the above-named Parties, and dated September 10, 1984 and having been duly sworn and having heard the proofs and allegations of the Parties and having duly considered the claim and counterclaims, a majority of the Panel of Arbitrators find as follows:

1.) JOHN UMANA (hereinafter referred to as "Claimant") was not a member with tenure of SWIDLER & BERLIN CHARTERED (hereinafter referred to as "Respondent") for the following reasons:

a.) Respondent never took actions necessary to make Claimant a partner with tenure and Claimant had no reason to believe otherwise;

b.) If Claimant at any time had become a partner with tenure at Swidler & Berlin, his transfer of stock back to the firm for consideration extinguished his rights as a partner with tenure; and

c.) If Claimant were a partner with tenure and did not extinguish his rights by the transfer of stock back to the firm,

Claimant is barred from asserting his claim by the doctrine of laches because he failed to take action in a timely manner to protest the firm's decisions with respect to his status.

Because of the Arbitrators' disposition of this issue, there is no need to address the question of what rights Claimant would have had as a partner or shareholder under the firm's pension program.

2.) With respect to Respondent's counterclaim asking for accounting and a portion of fees received by Claimant in the Newstedt/Hall Financial matter, that request is denied, except that Claimant is direct to pay FIFTY-ONE THOUSANTD TWO HUNDRED THIRTEEN DOLLARS AND SIXTY-SEVEN CENTS ($51,213.67) which Claimant does not contest represents the value of legal services performed by Respondent's personnel. (If the $51,213.67 includes the value of legal services performed by Claimant, that need not be paid to Respondent and should be deducted from the total amount.) That payment should occur within ninety (90) days of the final date of this decision and need not include payment of interest.

3.) With respect to Respondent's counterclaim for FIFTEEN THOUSAND ONE HUNDRED FIFTY-TWO DOLLARS AND EIGHTY CENTS ($15,152.80) fee paid to Claimant in connection with the Pakistan matter, that claim is denied.

Arbitrator Jules Bernstein, Esq. Dissents from the Panel judgement and a separate statement is attached.

The administrative fees and expenses of the American Arbitration Association shall be borne equally by the Parties.

Said fees and expenses shall be paid as directed by the American Arbitration Association. The compensation and expenses of the Neutral Arbitrator shall be borne equally by the Parties. Said compensation and expenses shall be paid as directed by the American Arbitration Association.

This Award is in full settlement of all claims submitted in this arbitration.

Dated: May 15, 1991 Signed: s/ Robert Pitofsky
Robert Pitofsky, Esq.
Arbitrator

Dated: May 15, 1991 Signed: s/ James Robertson
James Robertson, Esq.
Arbitrator

I hereby dissent from this Award and attached is my dissenting statement.

Dated: May 15, 1991 Signed: s/ Jules Bernstein
Jules Bernstein, Esq.
Arbitrator

DISSENTING OPINION OF ARBITRATOR JULES BERNSTEIN

Without citing a single fact or any supporting law, the panel's majority has resolved almost all of the principal issues in this case in favor of defendant. I submit in dissent that the relevant facts and applicable law require totally opposite conclusions and results.

THE FACTS

Early in 1984, John Umana ("Umana"), who was an associate in a major Washington, D.C. law firm, was approached by a legal "headhunter" concerning his interest in interviewing with the firm of Swidler & Berlin, Chartered ("Swidler"). Umana agreed and after some discussions with Swidler members which concerned, inter alia, how soon and on what terms Umana would join Swidler, an agreement was reached. Not a single document was produced in discovery reflecting the terms of Umana's joining the firm although such documents did exist in Swidler's files regarding other firm members. Umana produced his contemporaneous notes which indicated that he had met with three Swidler members on June 21, 1984, and that the terms of his being hired included a $100,000 guaranteed minimum salary in his first year, "no cap contrib 1st yr, 2nd yr? 1 yr contract . . ." (Emphasis added.)

Umana contends that it was agreed that he would be hired as a "contract member" for one year and that at the end of the year, assuming satisfactory service, he would become a full member of the firm. Swidler contends that the parties' agreement provided for a two-year "contract member" probationary period.

Umana commenced working at Swidler on September 10, 1984. At such time he signed a standard form employment agreement with Swidler such as was entered into by all members of the corporation. The agreement did not deal with the "one-year/two-year" issue presented herein.

On January 2, 1985, Umana was asked by Swidler to execute a continuing guarantee in favor of the bank which was then extending credit to the firm. The guarantee, which

Umana signed, bound him as a guarantor and surety of all of Swidler's indebtedness and obligations to the bank.

Later in 1985 Umana received a Swidler stock certificate which contained no limitations or restrictions. This was consistent with Swidler's corporate bylaws which established "one class of common stock."

On May 9, 1985, a senior member of Swidler referred to Umana as a "partner" in correspondence with another firm with which Swidler was engaged in merger negotiations. Also, Swidler held Umana out as an "above-the-line" member in its Martindale-Hubbell entry.

On October 31, 1985, the firm increased Umana's percentage share of the firm's profits. On the same date Umana was asked to make, and did make two capital contributions to Swidler in the amounts of $6,335.80 and $2,500."

On January 30, 1986, at Swidler's request, Umana submitted his personal financial statement to the firm's bank for the purpose of securing a line of credit for the firm. On August 15, 1986, at Swidler's request, Umana signed Swidler's secured note in favor of the same bank in the amount of $257,280.88. On the same day, again at Swidler's request, Umana executed a continuing guarantee in favor of the bank under which Umana agreed to serve as a personal guarantor and surety of all of Swidler's past, present and future indebtedness to the bank.

From the moment that Umana joined the firm he was assigned a major piece of litigation in Chicago in which a large and prestigious law firm was being sued in connection with the firm's representation in a securities matter of the clients that another Swidler member had brought to the firm.

Swidler concluded that as a securities specialist Umana would be valuable to the prosecution of the case. In fact, the case, in which the defendant law firm was being vigorously defended by another powerful firm, came to occupy most of Umana's time and energy at Swidler. Further, contrary to Swidler's expectations, the firm's clients in the case were unable to pay their bills so that the only hope of a fee recovery was through a fee award or settlement. Umana did not get along with the Swidler partner who had brought in the case for several reasons including matters relating to handling of the case. Further, at normal Swidler billing rates the firm had expended hundreds of thousands of dollars in fees and expenses on the case,1 a substantial amount of which represented Umana's time. Swidler was averse to litigation in which fee recoveries were contingent upon success and Umana was perceived by firm members as being responsible for the increasing liability to the firm that the case presented, although in fact he had been assigned to the case by the firm.

For reasons that appear unclear from the record, at the firm's annual meeting on October 29, 1986, Umana was asked to leave the meeting, after which he departed from the firm's offices. What occurred at the meeting is in dispute, but it is undisputed that there was no vote taken at the meeting to strip Umana of firm membership as required by the bylaws. The next day, Umana was visited by the firm's managing partner and another partner and was advised that the firm had decided to make him a non-equity member.

Thereafter, on October 31, 1986, the firm's bylaws were amended to create a new class of "non-tenured" members who would not receive stock or make capital contributions.

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1 For the period from April through December 1985 alone, claimed fees and expenses totalled approximately $400,000.

Subsequently, Umana endorsed and returned his share of stock to Swidler, after having accepted a return payment from Swidler of his capital contributions.2 Thereafter, Umana continued to work at Swidler on the Chicago case and other matters on a contact basis.3

After remaining at the firm into 1989, Umana left Swidler on June 1, 1989. He instituted this action in early December of the same year under the arbitration provision of his written employment contract.

CONCLUSIONS

1. The majority's holding that "Umana was not a member with tenure of Swidler . . ." because "Swidler never took actions necessary to make Mr. Umana a partner with tenure and Mr. Umana had no reason to believe otherwise . . ." flies in the face of the relevant facts and applicable law.

In 1985 Umana paid for and received a share of unrestricted Swidler stock which was of one class. He was represented by Swidler to its bank as a member and he was jointly and severally liable for all of the firm's debts and financial obligations. He was held out by Swidler to numerous third parties including courts, the legal profession

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2 Defendant's managing partner lamely claimed in a self-serving October 30, 1986 memorandum "that non-tenured Members should not have paid capital. John [Umana] was the only one to have paid and he has been given a refund. . . ." In fact, the class of "non-tenured" members was established in the firm for the first time the following day.

3 The ultimate fee and expense recovery to the firm in the Chicago matter was $2 million.

and the public as a member or partner. As a matter of fact and law, the foregoing established Umana's status as a full member of the firm. D.C. Code § 29-320(b) and (c). Swidler's contention that an alleged oral agreement modified Umana's unrestricted status as a firm member, even if assumed to be factually correct, is unavailing since such an agreement would not be a permissible defense under the applicable statute of frauds. D.C. Code § 28:8-319.4

In the foregoing respect, entirely lacking in credibility was the testimony of one Swidler partner who recalled to "a moral certainty" that it was Umana who took the position in negotiations that "the kind of one-year trial that [we were] talking about would be too short," and that Umana "thought he might need a longer trial period." Accordingly, "the terms we [were] talking about with John changed from one year to two years before we finalized [our] arrangement with him."

Thus the fact that Umana paid for and received his stock and assumed full financial responsibility for the firm's debts5 clearly establishes that he "enjoyed" membership in the firm.

2. Equally unpersuasive is the panel majority's alternative conclusion that even if Umana was at some time a tenured partner, "his transfer of the stock back to the firm for consideration extinguished his rights as a partner with tenure..."

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4 Further, that a firm such as Swidler would have no written record of the terms of hire of someone whom it had offered membership status, albeit conditionally, utterly defies credulity.

5 As most private practitioners know, "signing the note" is one of the hallmarks of "becoming a partner."

While it is true that Umana did turn in his stock and had his capital contributions returned,6 the fact is that at the time that he returned his stock he had been led to believe by Swidler that he had been removed from his tenured status by a 2/3 vote of the members in accordance with the firm's bylaws. In fact, such a vote never occurred, which Umana learned only after he left the firm in mid-1989.

The other members of Swidler had fiduciary obligations to Umana as a tenured member. This included dealing with him honestly, above board, and in good faith. In contrast, Swidler led Umana to conclude that he had been stripped of his tenure in accordance with the firm's bylaws and it was on this basis that he ministerially turned in his stock. Swidler is not entitled to benefit from the legerdemain that accomplished Umana's "dismemberment."

3. Similarly, the majority's reliance upon laches to bar Umana's claim is without foundation. It was not until after Umana left the firm in mid-1989 that he discovered that his return of his stock had been engineered by a deception and that the vote required to remove him as a tenured member had not been taken. Under these circumstances Umana acted with reasonable dispatch in asserting his claims and thus they are not barred by laches.

4. As to the panel's decision awarding Swidler compensation from Umana in connection with the Newstedt matter, such a claim might lie against Umana if the panel had

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6 Amazingly, and significantly, the firm never notified the bank that Umana returned his stock or even that he had left the firm in 1989. Indeed, at the time of the hearing herein, and thereafter, Umana remained at risk on the Swidler notes and line of credit.

concluded that Umana was a member at least until the time he left the firm, but in light of its conclusion that he was not, his obligations to the firm did not include compensating it for services during the period when he was working on a matter (which the firm had abandoned because of its contingent nature) by and for himself with the firm's consent, since receipt of such services by Umana was part of the "deal" applicable to the period prior to his departure.

For the foregoing reasons the undersigned believes that a judgment in favor of Umana should have been rendered herein awarding him his appropriate share of Swidler profits, and further that Swidler is not entitled to any recovery against Umana on its counterclaims.

s/ Jules Bernstein
Jules Bernstein

Dated: May 14, 1991

APPENDIX F -- AMENDED AWARD OF ARBITRATORS DATED JULY 22, 1991
[letter head of ARNOLD & PORTER]

Mr. Carlos Padilla
Tribunal Administrator
American Arbitration Association
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036

Re: John Umana and Swidler & Berlin, Chartered Arbitration Case No. 16 199 00669 89P

Dear Mr. Padilla:

By letter dated May 24, 1991, counsel for John Umana asked for a ruling on Mr. Umana's entitlement to accrued interest in the approximate sum of $4,000.00, compounded, on the belated return of his pension contribution.

Counsel for Swidler & Berlin responded to Mr. Umana's request in a letter dated June 10, and counsel for Mr. Umana replied in a letter dated June 25.

The arbitrators have reviewed the record and we find that we indeed failed to address an issue that was appropriately raised in the proceedings.

Two claims relating to Mr. Umana's entitlement to pension fund benefits were advanced. Swidler & Berlin initiated a new target benefit plan in 1989. A majority of the arbitration panel determined, however, that since Mr. Umana was never made a partner in Swidler & Berlin, he must have fallen into the category of "associate or non-tenured attorney" for purposes of the pension funds and therefore was entitled to no benefits under that pension fund. See Transcript, p.

328.

We have now further considered whether an earlier defined contribution pension plan at Swidler & Berlin, to which Mr. Umana contributed approximately $20,707.00 (see Transcript, p. 333) should have been invested by the trustee with interest accruing to his benefit.

While the record on this point is not perfectly clear, the arbitrators unanimously find that the preponderance of the evidence is to the effect that the trustees had a duty to invest Mr. Umana's contribution even though the participant made no investment directions. Transcript, pp. 332-35, 338-42. The uncontradicted testimony in the record is that Mr. Umana would therefore be entitled to accrued interest in the amount of $4,000.00, compounded.

Mr. Umana became eligible to participate in the plan in November 1987, see Defendants Exhibit 52. While the record again is not perfectly clear, it appears that the $4,000 total already includes compound interest. The arbitrators, therefore, conclude unanimously that $4,000.00 be treated as a setoff against monies the arbitrators previously determined should be paid by John Umana to Swidler & Berlin.

Very truly yours,

s/ Robert Ritofsky
Robert Pitofsky

s/ Jules Bernstein
Jules Bernstein

s/ James Robertson
James Robertson

APPENDIX G -- ORDER OF D.C. SUPERIOR COURT (JUDGE GRAAE) DATED AND DECIDED JUNE 15, 1992

JOHN UMANA, Plaintiff

v.

SWIDLER & BERLIN, CHARTERED, et al., Defendants.
No. 89-CA-12531

MEMORANDUM ORDER

On March 6 and March 20, 1992, this Court heard arguments on plaintiff's motion to vacate and/or modify an arbitration award. The Court made some rulings along the way, setting forth its reasoning on the record. Specifically, the Court held that Judge Cushenberry's 5/4/90 Order deeming plaintiff's complaint to be an arbitrable dispute was not only the "law of the case," but also correct in view of governing case law, notably Carter v. Cathedral Ave. Cooperative, Inc., 566 A.2d 716 (D.C. 1989); this Court also rejected defendants' claim that Mr. Umana's amended motion filed on 10/19/91 was time-barred. The Court took the other issues under advisement and herewith makes its findings as to each of the matters raised.

A. Exclusion of Material Evidence

Mr. Umana, citing D.C. Code §16-4311 (a)(4),1 argues that the award should be vacated because the arbitrators curtailed his discovery, thereby preventing him from timely discovering bank documents crucial to his claim that he was a

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1 D.C. Code §16-4311(a)(4) provides in relevant part that an arbitration award may be vacated if "arbitrators refused to hear evidence material to the controversy or otherwise so conducted the hearing . . . as to prejudice substantially the rights of a party."

partner with defendants (hereinafter "Swidler"). Given that Mr. Umana ultimately obtained the documents himself2 and had them admitted into the record for the arbitrators' consideration before their decision, this argument lacks any force. His assertion that cross-examination would have been more effective if the documents had been presented during the hearing may be valid, but it hardly rises to a claim that his rights were thereby substantially prejudiced. The evidence was presented to the arbitrators. That I failed to persuade is no ground for vacating the award.

B. Bias of Neutral Arbitrator

The core of Mr. Umana's argument that the award should be vacated rests on his claim of "evident partiality by an arbitrator appointed as a neutral . . ." D.C. Code §16-4311(a)(2). Specifically, Mr. Umana asserts that Mr. Robert Pitofsky, the neutral arbitrator selected by both sides, was biases against him. Mr. Pitofsky's bias allegedly arose out of his former association with Arnold & Porter and the cross-examination of Mr. Umana concerning the circumstances of Mr. Umana's departure from Arnold & Porter to join Swidler. Having examined the less than 20 pages (of what is a 765 page transcript of the arbitration hearing) devoted to the subject of Mr. Umana's departure from Arnold & Porter, the Court is genuinely mystified how this testimony affected the outcome, much less triggered or implicated any bias from Mr. Pitofsky arising out of his former association with Arnold and Porter. Mr. Umana's highly respected counsel, Jake Stein, Esquire, evidently saw nothing amiss with the subject matter of the cross-examination. Moreover, Mr. Pitofsky on behalf

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2 This fact strongly suggests to the Court that Mr. Umana did not need to discover the documents from Swidler and, thus, the arbitrators did not stand in his way. Moreover, Mr. Umana was at all times aware of the existence of the documents in question inasmuch as he had signed them.

of the panel, urged Swidler's counsel to move on to more productive areas ("... we thought the questioning was getting a little repetitious, and we feel we got the picture." TR 174). Celtech, Inc. v. Broumand, 584 A.2d 1257 (D.C. 1991), cited by Mr. Umana, requires a showing of "specific facts which indicate improper motives" on the part of the arbitrator. Id. at 1259. No such facts have been shown. Indeed, there is nothing in the record that comes even close to demonstrating partiality, much less "evident partiality," on Mr. Pitofsky's part.

Even if Mr. Umana were able to demonstrate partiality, there is authority for the proposition that he waived the point when he accepted Mr. Pitofsky as a neutral after full, prior disclosure of Mr. Pitofsky's connection with Arnold & Porter. See Sheet Metal Workers Int'l Ass'n v. Kinney Air Conditioning Co., 756 F.2d 742, 746 (9th Cir. 1985). Here it seems particularly appropriate to apply that principle given the absence of even a hint of an objection to Mr. Pitofsky's role as neutral arbitrator when Mr. Umana was being cross-examined about his departure from Arnold & Porter. In the final analysis, Mr. Umana's claim that Mr. Pitofsky was biased against him finds no support in the record and is therefore meritless.

C. Manifest Disregard of the Law

Mr. Umana argues as a further ground for vacating the award that the arbitrators issued their ruling in "manifest disregard of the law." It has long been established that the judicial role in reviewing arbitration awards is narrowly limited. In this jurisdiction, as the D.C. Court of Appeals recently held in Celtech, supra:

> . . . the burden on a party seeking to set aside the result of an arbitration proceeding remains a formidable one. An award may be vacated or

modified only on grounds clearly specified by statute. (Emphasis added) Id. at 1259.

"Manifest disregard of the law" is not a ground specified in D.C. Code §16-4311 or §16-4312 and, thus, is not a basis, even if shown, for vacating an arbitration award in the District of Columbia.

D. Counterclaim Judgment

The arbitrators awarded Swidler $51,213.67 on their counterclaim against Mr. Umana for the value of legal services Swidler performed on the Newstedt/Hall case. Mr. Umana challenges the award, but offers no grounds (other than a reargument of the facts presented to the arbitrators) that would bring his challenge within any of the statutory provisions for vacating or modifying an award. It is therefore denied.

CONCLUSION

Wherefore, in view of the foregoing findings on each of the points raised by Mr. Umana, the Court herewith ORDERS as follows:

1. The plaintiff's motion to vacate and/or modify the arbitration award is **DENIED.**
2. The decision of the arbitrators is **CONFIRMED** in its entirety.

June 15, 1992
Date

s/ Steffan W. Graae
STEFFAN W. GRAAE
JUDGE

APPENDIX H -- ORDER OF D.C. SUPERIOR COURT (JUDGE SUSAN R. HOLMES WINFIELD) DATED AND DECIDED SEPTEMBER 29, 1995

JOHN UMANA, Plaintiff

v.

SWIDLER & BERLIN, CHARTERED, et al., Defendants.
No. 89-CA-12531

ORDER

Upon consideration of defendants' motion to dismiss all claims against the individual defendants for failure to posecute, plaintiff's opposition thereto, the replies and the entire record herein, it appearing that by order dated May 4, 1990, the Honorable Harold L. Cushenberry stayed this action subject to all parties submitting to arbitration, it further appearing that on September 1, 1992, plaintiff noted an appeal from the order of May 4, 1990, 1 it further appearing that once a notice of appeal is filed, the trial court is divested of jurisdiction in the case, Smith v. Polin, 90 U.S. App. D.C. 178 (1952)2, it is this

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1 The appeal is also from an order by the Honorable Steffan W. Graae which granted plaintiff's motion for reconsideration of an order dated June 17, 1992. The June 17, 1992 order denied plaintiff's motion to vacate or modify the arbitration award. After reconsideration Judge Graaae again denied the motion to vacate or modify the arbiter's award.

2 There are limited circumstances, however, when a trial court may maintain jurisdiction over a case once it is on appeal. When a motion for a new trial or a motion to alter judgment is filed, the trial court may consider the motion. Cathedral v. Cathedral Avenue Co-Op, Inc., 532 A.2d 681 (D.C.App. 1987).

29th day of September, 1995

ORDERED that defendants' motion to dismiss for failure to prosecute be, and the same hereby is, **DENIED.**

s/ Susan R. Holmes Winfield
Susan R. Holmes Winfield
Associate Judge

/SIGNED IN CHAMBERS/
9/29/95
Date

Additionally, when a motion for reconsideration is filed while an appeal is pending, the trial court may consider the motion. Tate v. Equity Brokerage Corp., 506 A.2d 201 (D.C. App. 1986).

APPENDIX I -- ORDER OF D.C. SUPERIOR COURT (JUDGE FREDERICK H. WEISBERG) DATED AND DECIDED APRIL 21, 1997

JOHN UMANA, Plaintiff

v.

SWIDLER & BERLIN, CHARTERED, et al., Defendants.
No. 89-CA-12531

ORDER AND JUDGMENT

This litigation arose more than seven years ago out of a dispute between plaintiff Umana and his law firm, defendant Swidler & Berlin (hereinafter "the firm"). On December 8, 1989, plaintiff filed a complaint in this court against the firm and its individual members. At about the same time, plaintiff filed an arbitration demand against the firm only with the American Arbitration Association. On May 4, 1990, Judge Cushenberry granted defendants' motion to compel arbitration of all of plaintiff's claims against the firm and the individual defendants. In February of 1991, plaintiff arbitrated his claims against the firm but did not arbitrate against the individual defendants. The arbitrators denied plaintiff's claim against the firm and awarded $43,976.16 to the firm on its counterclaim against plaintiff. Thereafter, on June 15, 1992, Judge Graae denied plaintiff's motion to vacate or modify the award and entered an order confirming the award.1 On September 1, 1992, plaintiff appealed Judge Graae's order confirming the

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1 On June 16, 1995, Judge Graae denied plaintiff's motion to reopen the record and for a "new trial" based on plaintiff's allegation that there had been an undisclosed relationship between the arbitrator and one of the defendants.

arbitration award in favor of the firm and also appealed Judge Cushenberry's order compelling arbitration against the firm and the individual partners. On December 29, 1995, the Court of Appeals dismissed the appeal for lack of jurisdiction, holding that the order compelling arbitration was not an appealable order and that the order confirming the arbitration award against the firm, while plaintiff's claims against the individual defendants remained unadjudicated, was not a final judgment. 669 A.2d 717 (D.C. 1995).2 The matter is now before the court on the renewed motion of the individual defendants to dismiss for failure to prosecute,3 and on plaintiff's motion for default judgment against the individual defendants or, alternatively, for an order compelling the individual defendants to submit to arbitration within thirty days.

Judge Cushenberry's order of May 4, 1990 required plaintiff to arbitrate all of his claims against the firm and the individual defendants. Despite Judge Cushenberry's order, plaintiff chose to go forward in the arbitration against the firm

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2 Defendants filed a petition for rehearing en banc, which was denied on July 18, 1996. Defendants' petition challenged the court's denial of jurisdiction over the appeal of the order confirming the arbitration award in favor of the firm. Defendants did not challenge the dismissal of plaintiff's appeal of Judge Cushenberry's order compelling arbitration. Indeed, defendants' consistent position in this litigation has been that the order compelling arbitration was not appealable and that plaintiff has been under a continuing order to arbitrate his claims against the individual defendants.

3 On September 29, 1995, Judge Winfield denied defendants' earlier motion to dismiss for failure to prosecute, ruling that she lacked jurisdiction to grant the motion because of the pendency of plaintiff's appeal.

only.4 Plaintiff asserts that the individual defendants objected and failed to appear at the arbitration.5 Armed with Judge Cushenberry's order, however, it was incumbent on plaintiff at that time to seek an order compelling them to participate, or, if they refused, to move either for a default or an adjudication of contempt. Plaintiff did nothing. Instead, the arbitration proceeded against the firm, an award was made, and an order was entered confirming the award. 6 Even then, rather than proceed against the individual defendants, plaintiff elected to pursue a non-meritorious, premature appeal.

Nor can plaintiff claim that, on a motion to dismiss for failure to prosecute, he should not be charged with the time attributable to delay in the appellate court. Plaintiff chose to appeal rather than arbitrate his claims against the individual defendants. He knew, or should have known, that Judge Cushenberry's order compelling arbitration was not an appealable order. D.C. Code §16-4317 (1989); Hercules & Co. v. Shama Restaurant Corp., 566 A.2d 31, 38-39 (D.C. 1989); American Fed'n of Gov't Employees v. Koczak, 439

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4 Plaintiff's demand for arbitration, before Judge Cushenberry's order, was against the firm only. The record does not reflect that plaintiff made any attempt to amend the demand or to expand the arbitration to include the individual defendants after Judge Cushenberry's order. The Court of Appeals assumed that the arbitration went forward on the original demand for reasons that are not clear in the record. 669 A.2d at 718 n.3.

5 The individual defendants emphatically deny that they objected to arbitration of plaintiff's claims against them, and they have submitted affidavits from their attorneys and other evidence which support their position. Indeed, it is difficult to see how defendants could have resisted arbitration since it was they who sought and obtained the order from Judge Cushenberry compelling arbitration.

6 The Court of Appeals noted that the Superior Court had not entered a judgment confirming the arbitration award. 669 A.2d at 721 n.12. This order will cure that potential jurisdictional defect.

A.2d 478, 480 (D.C. 1981); see also Haynes v. Kuder, 591 A.2d 1286, 1287 n.1 (D.C. 1991).7 If plaintiff wanted to pursue a piecemeal appeal of the order confirming the arbitration award against the firm, he had a duty under Super. Ct. Civ. R. 54(b) to ask the court for entry of final judgment. If the court had made the necessary determination and entered final judgment, plaintiff's right to appeal that part of the case would have been perfected, and it would have been clear to all parties that plaintiff was under a continuing order to proceed to arbitration against the remaining defendants. With or without a Rule 54(b) certification, however, plaintiff's duty to arbitrate his remaining claims against the individual defendants was unabated and was certainly not excused by his pursuit of a frivolous appeal of the order compelling arbitration.

Seven years have passed since plaintiff was ordered to arbitrate all of his claims. For all of this time, plaintiff has taken none of the procedural steps necessary to arbitrate his claims against the individual defendants. At least since 1992, defendants have made clear to plaintiff at every turn their position that his failure to arbitrate his claims against the individual defendants in the face of Judge Cushenberry's order was tantamount to an abandonment of his claims against them under Super. Cr. Civ. R. 41(b). To revive those claims after all this time would be grossly unfair to the defendants, where plaintiff has utterly failed to show just cause for the delay.

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7 Despite numerous decisions interpreting Super. Ct. Civ. R. 54(b) to bar appeals from partial judgments (see, e.g., Dyhouse v. Baylor, 455 A.2d 900, 901 (D.C. 1983)), it appears that both parties assumed that an order confirming an arbitration award which adjudicated fewer than all claims was appealable pursuant to D.C. Code §16-4317 (1989). Even if there were some uncertainty in the law regarding the appealability of such an order, it has been settled in the law for many years that an order compelling arbitration is not appealable.

Brown v. Cohen, 505 A.2d 77 (D.C. 1986). 8

Accordingly, it is this 21st day of April 1997

ORDERED that the individual defendants' Renewed Motion to Dismiss for Failure to Prosecute be, and it hereby is, GRANTED; and it is further

ORDERED that plaintiff's Motion for Default Judgment or, alternatively, to Compel Arbitration be, and it hereby is, DENIED; and it is further

ORDERED that all claims asserted in plaintiff's complaint against Steven J. Agresta, Edward A. Berlin, John R. Ferguson, John S. Hoff, Lester S. Hyman, Carmen D. Legato, Bruce A. Lehman, Leonard A. Miller, Kenneth I. Schaner, Robert S. Taylor, and Andrew D. Weissman be, and they hereby are, dismissed with prejudice, and judgment shall be entered accordingly; and it is further

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8 With an unexcused delay of this duration, it is arguably unnecessary for defendants to demonstrate prejudice. Cf. Brown, 505 A.2d at 80. In any event, the prejudice to defendants caused by this unjustified and inordinately long delay is obvious. Records appear and memories fade. Defendants should have been allowed to defend against plaintiff's claims in a single arbitration, piggybacking on the defense provided by the firm. Even if the arbitration proceedings had been separated, a timely arbitration against the individual defendants in 1991 would have allowed for a single consolidated appeal from judgments confirming the separate awards. Finally, of course, the whole matter would have been resolved on the merits in a single appeal.. As it stands, the dismissal of the first appeal on jurisdictional grounds has protracted the proceedings, added to defendants' burden and expense, and will require at least one more trip to the appellate court.

ORDERED that the Clerk shall enter final judgment in favor of defendant Swidler & Berlin, Chartered, on the arbitration award in the amount of $43,976.16 plus interest, in accordance with this court's previous order confirming the arbitration award.

s/ Fredrick H. Weisberg
JUDGE FREDERICK H. WEISBERG

APPENDIX J -- CONSTITUTIONAL AND STATUTORY PROVISIONS

ARTICLE III, SECTION 1, U.S. CONSTITUTION

The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Court as the Congress may from time to time ordain and establish. The Judges, both of supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

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FIFTH AMENDMENT, U.S. CONSTITUTION

... nor shall any person ... be deprived of life, liberty or property, without due process of law ....

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FOURTEENTH AMENDMENT, §1, U.S. CONSTITUTION

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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D.C. CODE § 16-4311. **Vacating an award.**

(a)Upon application of a party, the Court shall vacate an award where:

(1) The award was procured by corruption, fraud or other undue means;

(2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;

(3) The arbitrators exceeded their powers;

(4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of section 16-4315, as to prejudice substantially the rights of a party; or

(5) There was no arbitration agreement and the issue was not adversely determined in proceedings under section 16-4312 and the party did not participate in the arbitration hearing without raising the objection; but

the fact that the relief was such that it could not or would not be granted by a Court of law or equity is not ground for vacating or refusing to confirm the award.

(b) An Application under this section shall be made within ninety days after delivery of a copy of the award to the applicant, except that, if predicated upon corruption, fraud or other undue means, it shall be made within ninety days after such grounds are known or should have been known.

(c) In vacating the award on grounds other than stated in clause (5) of subsection (a) of this section the Court may order a rehearing before new arbitrators chosen as provided in the agreement, or in the absence thereof, by the Court in

accordance with section 16-4303, or if the award is vacated on grounds set forth in clauses (3) and (4) of subsection (a) of this section the Court may order a rehearing before the arbitrators who made the award or their successors appointed in accordance with section 16-4303. The time within which the agreement requires the award to be made is applicable to the rehearing and commences from the date of the order.

(d) If the application to vacate is denied and no motion to modify or correct the award is pending, the Court shall confirm the award.

APPENDIX K -- ARBITRATION CLAUSE IN SWIDLER, BERLIN & STRELOW EMPLOYMENT AGREEMENT OF JOHN UMANA, DATED SEPTEMBER 10, 1984

10. Arbitration. Any dispute with regard to any aspect of the relationship between the parties pursuant to this Agreement that cannot be settled by mutual agreement shall be determined by a majority of three arbitrators. Each party shall designate one arbitrator, and the two so selected shall select a third. Any such arbitration proceeding shall be conducted in accordance with the rules of the American Arbitration Association.